Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

FOREST PROPERTIES, INC.
(now known as RCK Properties, Inc.),
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for Writ of
Certiorari to the United States Court
of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May government deny a Clean Water Act § 404 permit thereby taking a parcel of real property and avoiding the payment of just compensation by claiming that the parcel is not the relevant parcel but rather part of a larger parcel when in fact it was a separate parcel acquired at a different time and by a different method, is under different ownership, is located in a different political jurisdiction and is subject to an entirely different permit process?

2. May a property purchaser be denied just compensation because of notice of a preexisting governmental permit scheme, especially one that does not indicate the property owner has any reason to believe its permit application would not be granted or that, if not, just compensation would not be paid?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are Forest Properties, Inc. (now known as RCK Properties, Inc.) (FPI) and the United States acting through the United States Army Corps of Engineers (Corps of Engineers).

FPI is the owner of the subject real property and was the applicant in the underlying administrative proceedings. RCK Properties, Inc. (RCK) was the parent corporation to its wholly owned subsidiary FPI and was the successor by merger with FPI. RCK is a wholly owned subsidiary of its parent corporation, Henley Management Company. No publicly held company owns 10% or more of the stock of RCK.

The United States acting through the Corps of Engineers is organized and operating under the laws of the United States. Under the Clean Water Act, 33 U.S.C. § 1251, ***et seq.***, the Corps of Engineers has jurisdiction to issue Section 404 permits, as defined by law.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit was reported as ***Forest Properties, Inc. v. United States***, 177 F.3d 1360 (Fed. Cir. 1999); the entire opinion appears as Appendix A to this Petition. The opinion of the United States Court of Federal Claims was reported as ***Forest Properties, Inc. v. United States***, 39 Fed. Cl. 56 (1997); the entire opinion appears as Appendix B[1] to this Petition. On August 6, 1997, its judgment and opinion were issued.

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered judgment accompanied by its opinion on May 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V.

STATEMENT OF THE CASE

A. Procedural Background

The primary issue in this case is whether the government's denial of Forest Properties, Inc.'s (FPI)

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[1] All further references to appendices hereto are shown as App.

application for a Section 404[2] permit necessary to develop certain lakebottom land in Big Bear Lake in the County of San Bernardino, California, constituted a taking of private property for public use requiring just compensation. App. A2.

On December 16, 1992, FPI filed a complaint in the United States Court of Federal Claims alleging inverse condemnation. The Court of Federal Claims had jurisdiction of the subject matter pursuant to the Tucker Act which provides that court with original jurisdiction to render judgment upon any claim against the United States founded upon the Constitution, any Act of Congress, or any regulation of an executive department.[3] After trial, the Court of Federal Claims indicated this would have been a taking if the property taken was the relevant parcel. The court, however, found that FPI had not established a taking claim because the subject parcel was not the relevant parcel but rather part of a larger parcel. App. B35-36. Judgment was entered against FPI on August 6, 1997.

The judgment was appealed and on May 19, 1999, the United States Court of Appeals for the Federal Circuit entered its opinion and judgment affirming the judgment of the Court of Federal Claims. App. A.

In its opinion, the Court of Appeals for the Federal Circuit held that the denial of a Clean Water Act § 404 permit by the respondent was not a taking requiring the payment of just compensation because the court found the subject parcel was part of the larger relevant parcel. The

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[2] Federal Water Pollution Control Act, Amendments of 1972, 33 U.S.C. § 1344 (Clean Water Act).

[3] 28 U.S.C. § 1491(a)(1).

court so held despite the fact that the lakebottom parcel had never been part of any other parcel, was acquired at a different time and by a different method, was under different ownership, and is located in a different jurisdiction with an entirely different permit process. App. A10. The permit was denied even though comparable properties in the area were allowed to develop. As the permit denial deprived FPI of any beneficial use of the lakebottom property, it is petitioner's position that this was a categorical taking requiring just compensation. App. B35.

B. Factual Background

The following is a summary of the pertinent facts underlying this action[4]:

This case grows out of the planned residential development of two segments of property. The first segment is a 53-acre tract of upland contiguous to Big Bear Lake in Southern California. The second is 9.4 acres of lakebottom contiguous to the aforementioned upland. The petitioner FPI and Big Bear Properties, Inc. (BBP) are, respectively, commonly owned real estate development and real estate holding companies. App. A2

In 1969, BBP purchased 2,500 acres of land adjoining Big Bear Lake for about $4 million. As part of the same contract, it also received a 20-year irrevocable option from a local water company to purchase up to 200 acres of lakebottom land at $1,000 per acre. The option could be exercised only by an entity (BBP or a successor) that owned the land adjacent to the optioned lakebottom land. As the

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[4] The Court of Federal Claims made extensive factual determinations. App. B2-20. The Court of Appeals for the Federal Circuit summarized those facts at App. A2-6.

lake was quite shallow, any use of it would require filling and/or dredging, and the water company had the right to approve any plans for doing so. App. A2.

In the early 1980s, the number of acres subject to the option was reduced. The water district approved BBP's tentative plan to fill and create housing sites onto 9.4 acres of lakebottom off of Eagle Point, a particularly scenic spot. It was provided that "[t]he deed of the District conveying the Lake Bottom Land ... shall contain a reversionary clause under which title to [the lake-bottom] shall revert to the District if the proposed excavation and filling ... shall not be completed within three years after the date of said deed." App. A2-3.

In March 1988, BBP applied to the Corps of Engineers' office for a Section 404 permit for a dredge and fill of approximately nine acres at Big Bear Lake adjacent to a residential subdivision. After filing the permit application, BBP, in May 1988, sold 53 acres of the uplands to FPI for $3.6 million. Five months later, in October 1988, BBP assigned to FPI the option to the 9.4 acres of lakebottom, without additional payment. FPI also took over the Section 404 permit application. App. A4.

FPI exercised the option by entering into a contract to purchase the lakebottom land from the water district. It also agreed with the water district to postpone the closing under the contract, thereby delaying the execution of the deed and avoiding the three year dredge-and-fill period established by the settlement agreement. By entering into the contract, FPI obtained equitable title to the lakebottom land under the doctrine of equitable conversion. App. A5.

In February, 1992, the Corps of Engineers denied FPI's permit application. App. A5. FPI proceeded to develop the upland property. FPI estimated that the additional lots on the

proposed filled-in lakebottom property would have provided an additional profit of $2.36 million and claimed that its equitable title to the lakebottom now is worthless. App. A5-A6.

FPI filed the present lawsuit in the Court of Federal Claims, seeking just compensation for the government's alleged taking of its property. FPI argued that the denial of the permit was a taking because it both deprived FPI of productive use of the lakebottom land and would result in title to the lakebottom land reverting to the water district. There is nothing in the record that suggests that FPI had prior notice that the Section 404 permit would be denied or that, if denied, compensation would not be paid. In fact, the court indicated that if it had decided that the 9.4 acres was the pertinent property, it most likely would have proceeded to analyze the case as a categorical taking. App. B35. After trial, the court held that there had been no taking and dismissed the complaint. The court also held that because the regulation deprived FPI of only a small portion of the entire development and because the development as a whole was still profitable, "the economic impact of the regulation is not sufficiently severe to constitute a taking." App. A6.

The decision of the Court of Federal Claims was subsequently upheld by the Court of Appeals for the Federal Circuit. The Circuit Court also held that the investment-based expectations criterion "limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation." App. A12.

FPI argued that its property has been categorically taken. The effect of the government's denial of the Section 404 permit was to prevent FPI from filling the lakebottom land and building houses on it. The permit denial also deprived FPI of any beneficial use of the lakebottom property and was

thereby a categorical taking requiring compensation. App. B35. Furthermore, FPI had the right to assume its permit application would be granted or if not that just compensation would be provided. App. B32.

FPI also argued that the permit denial was a regulatory taking because the lakebottom fill was not a nuisance, the permit denial placed the economic burden of wetlands protection solely and unfairly on FPI and the permit denial vitiated FPI's distinct investment-backed expectations.

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW CONFLICTS WITH OPINIONS OF THE OREGON SUPREME COURT AND THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND FEDERAL CIRCUITS IN THEIR TREATMENT OF THE RELEVANT PARCEL ISSUE IN TAKINGS CLAIMS BROUGHT UNDER THE FIFTH AMENDMENT

The importance of the constitutional question raised by this case is underscored by the existence of deep conflicts on this issue between the states and among the United States Courts of Appeals. Although FPI's Fifth Amendment takings claim was denied by the Court of Federal Claims and the Court of Appeals for the Federal Circuit, it would have been upheld by the Oregon Supreme Court under that state's interpretation of the federal Constitution. FPI also would have prevailed in certain circuits of the United States Courts of Appeals and before different panels of the Court of Appeals for the Federal Circuit. Other states and circuits are hopelessly divided on this issue. The rights guaranteed to citizens under our Constitution should not depend on the particular state or federal jurisdiction in which they are

asserted. This Court should grant the petition to establish uniformity in the treatment of takings claims under the Fifth Amendment.

The Oregon Supreme Court has found a taking when environmental regulation required that a discrete segment of a larger tract must be used for endangered species habitat. In ***Boise Cascade Corporation v. Board of Forestry***,[5] the state Board of Forestry denied an application to harvest timber on a 64-acre tract to protect an endangered species (the northern spotted owl) that had established its habitat on the plaintiff's property. The Board of Forestry specified an 8-acre segment that could be harvested subject to certain conditions, thereby carving out a 56-acre segment that was deprived of all economically viable use and forced into service as species habitat.[6] The property owner sued, alleging a Fifth Amendment taking of the 56-acre segment.

The Oregon Supreme Court found that the plaintiff had stated a claim for a taking by alleging "'depriv[ation] ... of the only economically viable use of approximately 56 acres of merchantable timber.'"[7] The court emphasized that it considered the regulated 56 acres to be the relevant parcel for its takings analysis by denying a concurrent claim for a temporary taking of the remainder of the 64-acre tract![8]

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[5] 325 Or. 185, 935 P.2d 411 (1997).

[6] ***Id.*** at 188.

[7] ***Id.*** at 198 (citing complaint).

[8] ***Id.*** at 197-98.

The opinion below also conflicts with the Federal Circuit's decision in ***Loveladies Harbor, Inc. v. United States***.[9] In ***Loveladies***, landowners brought a claim for the regulatory taking of a 12.5-acre segment of a 51-acre parcel. Originally, the 51 acres had been part of a 250-acre tract, most of which had already been developed and sold.[10] When the Corps of Engineers denied Loveladies a federal permit needed to develop the 12.5 acres, instead requiring the land to be used for wetlands preservation, Loveladies brought suit against the federal government for just compensation under the Takings Clause.

The Federal Circuit Court was directly confronted with the relevant parcel issue. The government contended that the relevant property for a takings analysis was either Loveladies' original 250-acre tract or the 51-acre parcel which it still owned when the permit was denied.[11] Loveladies argued that the relevant parcel of the takings was the 12.5 acres for which it had sought a permit.[12]

The Federal Circuit Court agreed with Loveladies, declining to include the impact of the permit denial on the remaining 38.5 acres. The court concluded that "the relevant property for the takings analysis is the 12.5 acres, for which the trial court found the remaining value to be de minimis."[13] Consequently, the Court of Appeals for the Federal Circuit held Loveladies had been deprived of all

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[9] 28 F.3d 1171 (Fed. Cir. 1994).

[10] ***Id.*** at 1180.

[11] ***Id.***

[12] ***Id.*** at 1181.

[13] ***Id.***

economically beneficial use of the "relevant parcel." Thus the permit denial was "effectively a total taking of the property owners' interest ***in these [12.5] acres***."[14]

The decision below also conflicts with the Ninth Circuit Court's decision in ***American Savings and Loan Association v. County of Marin***.[15] Marin County applied two different zoning classifications to two contiguous segments of a landowner's property. One 48-acre section called Strawberry Spit (Spit) was zoned as urban open space with a 5-acre minimum lot size. An adjacent 20-acre section known as Strawberry Point (Point) was zoned to allow 4 multi-residential units per acre.[16] Point was worth some $2 million under this zoning arrangement.[17] Nevertheless the owner sued, alleging a regulatory taking of Spit because of the severe zoning restrictions on the 48-acre section. The trial court held that, since Spit and Point were contiguous sections of land under common ownership, the entire 68 acres comprised the relevant parcel for purposes of determining takings liability.[18]

On appeal, the Ninth Circuit Court recognized that the issue before it was "whether the challenged ordinance creates two separate parcels for taking purposes by adopting different zoning designations for each parcel."[19] The court rejected,

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[14] ***Id.*** at 1182 (emphasis added).

[15] 653 F.2d 364 (9th Cir. 1981).

[16] ***Id.*** at 367.

[17] ***Id.*** at 368.

[18] ***Id.***

[19] ***Id.*** at 370.

as inapplicable, cases wherein property was treated as a single unit for takings purposes because in those cases "the entire subject property was covered by a uniform restriction."[20] Instead, the Ninth Circuit noted that this Court in ***Nectow v. City of Cambridge***[21] applied separate constitutional analyses to two contiguous segments of property under common ownership that had been subjected to different zoning.[22]

Most significantly, the ***American Savings*** court concluded by holding that if the appellant can show that "the Spit and Point have been, or would be, treated separately when its development plans are submitted ... [then] the Spit must be analyzed as a separate parcel for takings purposes."[23]

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[20] ***Id.*** at 369.

[21] 277 U.S. 183 (1928).

[22] ***American Savings and Loan***, 653 F.2d at 370.

[23] ***Id.*** at 372. ***Accord, Kaiser Development Co. v. City and County of Honolulu***, 649 F. Supp. 926 (D. Haw. 1986), ***aff'd***, 898 F.2d 112 (9th Cir. 1990). In deciding to treat different segments of a single legal property as separate parcels for purposes of its takings analysis, the court cited as the "most important" consideration the fact that "the City has treated Queen's Beach separately for zoning and planning purposes. ... In summary, under the facts of this case, Queen's Beach is to be considered a separate parcel for the purposes of determining whether there has been a taking." 649 F. Supp. at 947-48.

The Ninth Circuit Court of Appeals also agreed with the Oregon Supreme Court's analysis in ***Fifth Avenue Corp. v. Washington County***[24] wherein that court "divided the property analytically into two separate parcels" depending on whether they were zoned as developable or not.[25]

On the other hand, the Federal Circuit Court's decision in the subject case is fully consistent with the decisions of the Michigan courts in ***Volkema v. Department of Natural Resources*** [26] and ***K & K Construction, Inc. v. Department of Natural Resources***.[27] In ***Volkema***, the court found that wetlands preservation of a 6-acre parcel denying the owner of all beneficial use did not require just compensation. The rationale was based on the 6-acre segment being included in a larger 24.6-acre tract. That decision, however, is inconsistent with decisions in the State of Pennsylvania[28] and earlier decisions of the Michigan Court of Appeals.[29]

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[24] 581 P.2d 50 (Or. 1978).

[25] ***American Savings and Loan***, 653 F.2d at 370.

[26] 214 Mich. App. 66, 542 N.W.2d 282 (1995).

[27] 456 Mich. 570, 585-86, 575 N.W.2d 531 (1998).

[28] ***Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania***, 719 A.2d 19, 28 (1998).

[29] ***K & K Construction, Inc. v. Department of Natural Resources***, 217 Mich. App. 56, 551 N.W.2d 413 (1996).

The Court of Federal Claims in the subject case made this critical holding:

> "If the Court were to have decided that the pertinent property was solely the 9.4 acres of lakebottom property for which FPI sought, and was subsequently denied, a section 404 permit, then this Court would most likely have proceeded to analyze this case as a ***Lucas***-type categorical taking. The justification would be that the value of the lakebottom land was essentially eviscerated due to the inability of FPI to dredge and fill the area and place residential homes on the acreage." App. B35.

In the case of a categorical taking, liability is a foregone conclusion.[30] However, the subject Circuit Court of Appeals held that FPI's claim for the total taking of the lakebottom parcel failed because the court should consider the value remaining in the contiguous 53-acre upland parcel owned by FPI. App. A6. This is the position the government took in ***Loveladies*** but was unsuccessful.

FPI presents a stronger case than that of the plaintiff in ***Loveladies***. There, the 12.5 acres were part of the original 250-acre parcel. Here, FPI's lakebottom parcel has never been part of the larger upland parcel. FPI acquired its interests in the two parcels at different times and by different methods. FPI acquired the upland parcel by grant deed on May 3, 1988, and holds that parcel in fee simple. App. B5; Joint Exhibit 7 at Court of Appeals for the Federal Circuit,

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[30] ***Brown v. United States***, 73 F.3d 1100, 1103 (Fed. Cir. 1996).

Joint Appendix 1041-42[31]; Foulkes testimony, JA 315:22-316:1. FPI does not hold, and has never held, fee title to the lakebottom parcel. FPI acquired an equitable interest in the lakebottom parcel by the exercise of the option on November 29, 1988, and the water district still holds the legal title in fee. App. B8-9, 26-30; Foulkes testimony, JA 316:2-17. The two parcels are in different jurisdictions: the upland parcel is in the City of Big Bear Lake and the lakebottom parcel is in the unincorporated area of San Bernardino County. Foulkes testimony, JA 316:25-317:5.

In the present case, the lakebottom land has been treated separately for development purposes. Not only the Section 404 permit but numerous other state and local permits (including dredge and fill and shorezone alteration permits) were required to develop the lakebottom land. App. B11-13; Foulkes testimony, JA 302:12-303:12. These permits were not required for the upland parcel. Under the ***American Savings*** test, the lakebottom land is a separate parcel.

The separate nature of the lakebottom and upland parcels is emphasized by the facts of this case. Local government levies taxes based on parcels. FPI pays property taxes on the upland parcels ~~that it owns~~ at Eagle Point but does not pay property taxes on the lakebottom parcel because FPI does not own the lakebottom parcel. Foulkes testimony, JA 317:6-20.

When FPI created its Eagle Point project, it did not consider the upland and lakebottom parcels as part of a single parcel. This was because the lakebottom parcel was never fully defined in that it was changing shape and location

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[31] All further references to the Joint Appendix are shown as JA.

during the life of the project. Foulkes testimony, JA 318:11-20. However, the upland parcel could be developed and, in fact, is being developed without the development of the lakebottom parcel. App. B18; Foulkes testimony, JA 318:22-319:1.

If the fill had been completed on the lakebottom project, it would have been possible to develop the lakebottom without developing the adjacent uplands. The lakebottom land was a separate parcel that could have been zoned and developed within the county or within the city. All that would have been needed would be to put road access containing the various utilities to the site from the adjacent road. Dodson testimony, JA 449:19-450:9; Foulkes testimony, JA 354:16-355:2.

The upland parcel and the lakebottom parcel are sometimes described as one project in some documents because the City of Big Bear Lake, in April, 1988, indicated that it would not issue a grading permit on the lakebottom unless a tentative tract map was filed on both the upland and the lakebottom parcel. At that point the project grew to include both parcels. Foulkes testimony, JA 319:2-12. However, there is a difference between a parcel and a project. A development project may consist of more than one parcel. Different owners of different parcels can cooperate and use their separate parcels as part of a development project but that does not make each parcel part of a whole single parcel. Foulkes testimony, JA 317:21-318:10.

The Court of Federal Claims, App. B43, B54, relied on cases such as ***Deltona Corporation v. United States***,[32] which holds that under certain circumstances where claimants

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[32] 657 F.2d 1184 (Ct. Cl. 1981).

divide the original property they may not later assert takings claims solely for those divided portions. Here, by contrast, FPI acquired the two parcels by separate transactions at separate times. FPI acquired the upland parcel by Corporation Grant Deed on May 3, 1988, App. B5, and acquired the option rights to the lakebottom parcel on October 17, 1988, App. B6, and acquired equitable title to the lakebottom parcel by exercise of the option on November 29, 1988. App. B8. The parcels have never been divided because they have never at any time been part of the same parcel.

With the resulting loss to FPI of the lakebottom land caused by the denial of the Section 404 permit and the required reversion of that parcel to the water district, FPI retains none of the incidents of ownership of that parcel. It does not have the right to use the lakebottom land in its current condition, to restrict or permit access to it by others, to sell, lease or give it away, in whole or in part. In fact, after the reversionary clause's resulting divestment of the lakebottom land, FPI will not retain a single stick in the bundle of property rights adhering to that land.[33]

But even more telling is the unique legal status of the lakebottom parcel. Section 7.d. of the 1983 Agreement requires that the lakebottom parcel must be filled within three years of the date of the deed of conveyance of that parcel or else the title to the parcel shall revert to the water district. App. B4-5; Joint Exhibit 4, JA 1024. Thus if FPI cannot get its fill permit, it loses the lakebottom parcel altogether. This factor alone shows that, legally, the two parcels are separate and distinct. In summary, the distinct physical and legal

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[33] ***See Lucas v. South Carolina Coastal Council***, 505 U.S. 1003, 1027 (1992).

characteristics of the lakebottom parcel show that said parcel has never been part of the upland parcel and is therefore the only relevant parcel for the takings analysis.

II

THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW LEFT OPEN BY *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL* THAT DESERVES RESOLUTION BY THIS COURT

In *Lucas*, this Court declared that land use restrictions that deprive owners of all economically beneficial use of their property trigger the requirement for just compensation under the Takings Clause of the Fifth Amendment.[34] The *Lucas* opinion candidly admitted, however, that

> "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole."[35]

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[34] 505 U.S. at 1019.

[35] 505 U.S. at 1016 n.7.

The uncertainty surrounding this issue has imposed severe costs on property owners, as illustrated by the case at bar. Petitioner respectfully submits that the time has come for this Court to revisit the partial categorical takings issue left open in ***Lucas***.

Lucas states that there are at least two discrete categories of regulatory action that are compensable without case-specific inquiry into the public interest advanced in support of the action. The first includes regulation that compels the property owner to suffer a physical "invasion" of his property. The second category includes regulation that denies all economically beneficial or productive use of the land.[36] These two types of regulatory action have come to be known as "categorical takings." App. A7.

The lower courts misunderstood the nature of categorical takings. As stated by the Court of Federal Claims: "Critical to this Court's determination that the regulatory taking analysis is the appropriate method to use to analyze FPI's taking claim is its determination of the relevant parcel that has been allegedly taken." App. B22. The court apparently believed that if "only a small portion of the plaintiff's property has allegedly been taken" a categorical taking has not occurred. ***Id***. The court reaffirmed this position in the following holding:

> "Clearly, the Corps' denial of FPI's permit did not deprive FPI of ***all*** economic viability for the relevant parcel. On the contrary, the facts undeniably confirm that substantial and viable economic use remains in the integrated development of uplands and lakebottom at the Eagle Point Estates

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[36] 505 U.S. at 1015.

> project. Thus, a categorical taking, or a ***per se*** taking, simply did not occur." App. B41 (footnote omitted; emphasis by court).

The Federal Circuit Court similarly described this in ruling that "because the regulation deprived Forest of only a small portion of the entire development and because the development as a whole was still profitable, 'the economic impact of the regulation is not sufficiently severe to constitute a taking.'" App. A6.

These statements are factually and legally incorrect. Factually, the Corps of Engineers' denial of the Section 404 permit prevents any "integrated development of uplands and lakebottom." Indeed, the denial means there can be no development whatever of the lakebottom and ownership of the lakebottom will revert to the water district. Legally, the true test of a categorical taking is, as the trial and appellate courts acknowledged, whether a physical occupation occurred or all beneficial or productive use of the property has been prohibited. App. B22; App. A7.

Had the government formally condemned the 9.4 acres of lakebottom land and conveyed it to the water district for use as a wildlife preserve there would be no argument that such action constituted a taking of FPI's property. The fact that the same result was obtained through denial of the Section 404 permit does not make the government's actions any less of a taking of FPI's property.

The second situation in which categorical treatment of takings is appropriate is where regulation denies all economically beneficial or productive use of land.[37] ***Lucas*** indicates that the justification for this rule may be that total

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[37] ***Lucas***, 505 U.S. at 1015.

deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.[38] The Court notes its "frequently expressed belief that when the owner of real property has been called upon to sacrifice ***all*** economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[39] The government's denial of the Section 404 permit deprives FPI of any economically beneficial use of the lakebottom parcel. App. B35. In the terms of ***Lucas***, the denial of FPI's permit application requires that FPI leave its property economically idle and constitutes a taking. App. B35.

In ***Lucas***, this Court found the deprivation of all economically viable use of David Lucas' two beachfront lots gave rise to a categorical taking (barring a showing that the owner's proposed property use was foreclosed by state common law principles).[40] Compensation was required because the enactment of South Carolina's Beachfront Management Act had displaced the entirety of Mr. Lucas' rights of dominion and control over the use of his property. But the state would have taken no less if Mr. Lucas had happened to own a third lot, on which he could build. If Mr. Lucas had all along owned a third parcel on the Isle of Palms, located inland of the "no-build" line established by the Beachfront Management Act, would this have altered the outcome of his case? There is no reason to believe that fact would have been relevant to the takings analysis.

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[38] ***Id.*** at 1017.

[39] ***Id.*** at 1019 (emphasis in original).

[40] ***Id.*** at 1029-31.

As Professor Epstein notes:

> "Prima facie, compensation must be paid for the land taken no matter how much land the owner retains. ... In the case [where the state takes two acres of land from a four-acre parcel], what is decisive is that which is taken, not that which is retained. It matters not if the claimant owns only the two acres taken or the full four acres; the obligation to compensate is constant in either case."[41]

The task of determining the relevant parcel for Fifth Amendment takings claims, is "[o]ne of the most troubling areas in current takings jurisprudence."[42] The doctrinal importance of this issue has been well summarized by Professor Epstein:

> "The protection afforded by the eminent domain clause to each part of an endowment of private property is equal to the protection it affords the whole--no more and no less. No matter how the basic entitlements contained within the bundle of ownership rights are divided and no matter how many times the division takes place, all of the pieces together, and each of them individually, fall within the scope of the eminent domain clause."[43]

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[41] Richard Epstein, ***Takings: Private Property and the Power of Eminent Domain*** 57-58 (1985).

[42] Marc R. Lisker, ***Regulatory Takings and the Denominator Problem***, 27 Rutgers L.J. 663, 725 (1996).

[43] Epstein, ***Takings*** at 57.

There are doctrinally important reasons for this Court to clarify that *Lucas*' categorical rule applies to the taking of discrete, independently viable parcels of real property, even when these parcels comprise less than the totality of an owner's property holdings.

There are compelling reasons for this Court to apply *Lucas*' categorical takings rule to the regulatory deprivation of all beneficial use of a discrete, independently viable segment of real property. Deprivations such as those imposed by the Corps of Engineers in the case at bar entail the assertion of complete dominion and control over real property, for which compensation has traditionally been required. The segment of property that has been rendered unusable had independent economic viability prior to application of the regulations at issue. FPI had formed concrete, reasonable, investment-backed expectations regarding its use of the property, which were completely extinguished by the Corps of Engineers' actions.

III

HOLDING THAT "ONE WHO BUYS PROPERTY WITH KNOWLEDGE OF A REGULATORY RESTRAINT ASSUMES THE RISK OF ECONOMIC LOSS" IS INCONSISTENT WITH RULINGS OF THIS COURT, THE SUBJECT COURT OF FEDERAL CLAIMS, AND THE UNITED STATES COURT OF APPEALS BUT CONSISTENT WITH THE RULINGS OF THE NEW YORK, CALIFORNIA, AND VIRGINIA SUPREME COURTS

The Court of Appeals for the Federal Circuit states that "[t]he investment-based expectation criterion 'limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged

regulation. One who buys with knowledge of a restraint assumes the risk of economic loss.'" App. A12-13. However, this Court held in ***Nollan v. California Coastal Commission***[44]:

> "Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."

The Court of Appeals for the Federal Circuit's language also is too broadly stated. More appropriately it would be phrased to include property owners who bought their property in reasonable reliance on their ability to comply with the regulation at issue. "[A]fter all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." ***Florida Rock Industries, Inc. v. United States***[45] (citing ***United States v. Riverside Bayview Homes, Inc.***[46]).

The Federal Circuit Court's decision in this respect is even in direct contravention with the Court of Federal Claims decision in the subject case which states "[t]his Court believes, however, that a ***permit***-based regulatory system presents a situation in which it is fallacious to argue that the

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[44] 483 U.S. 825, 833 n.2 (1987).

[45] 18 F.3d 1560, 1580 (Fed. Cir. 1994).

[46] 474 U.S. 121, 127 (1985).

existence of the regulatory regime can deny a property owner the requisite compensable property interest." App. B32. *See* discussion, App. B30-32.

The Federal Circuit Court's ruling also is inconsistent with the same Circuit Court's decision in ***Preseault v. United States***.[47] There it was stated "the statute does not say that such actions are without consequences to the property owners, nor does it say that the property owners will not, or must not, be compensated for such actions."[48]

However, the Circuit Court's ruling is fully consistent with the decisions of the New York Supreme Court in ***Kim v. City of New York***,[49] ***Anello v. Zoning Board of Appeals of the Village of Dobbs Ferry***,[50] ***Basile v. Town of Southampton***,[51] and ***Gazza v. New York State Department of Environmental Conservation***.[52]

It also is consistent with the California Supreme Court's rent control decision in ***Kavanau v. Santa Monica Rent Control Board*** [53] where that court stated: "[s]imilarly, the 'interfere[nce] with [Kavanau's] distinct investment-backed

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[47] 100 F.3d 1525 (Fed. Cir. 1996).

[48] ***Id.*** at 1551.

[49] 90 N.Y.2d 1, 659 N.Y.S.2d 145 (1997).

[50] 89 N.Y.2d 535, 656 N.Y.S.2d 184 (1997).

[51] 89 N.Y.2d 974, 655 N.Y.S.2d 877 (1997).

[52] 89 N.Y.2d 603, 657 N.Y.S.2d 555 (1997).

[53] 16 Cal. 4th 761, 780 (1997) (brackets in original).

expectations' was minor, considering he had constructive knowledge of the 12 percent limit when he chose to improve his property."

Similarly, the Virginia Supreme Court in ***City of Virginia Beach v. Bell*** [54] ruled:

> "In Lucas, the plaintiff property owners purchased the land prior to the enactment of the regulation restricting the use of their property. Thus, the subsequent regulation directly affected the property owners' 'bundle of rights' which, at the time of their purchase, included the right to develop their property freely.
>
> "In contrast to Lucas, however, the Ordinance at issue here predated Bell's and the Trustee's acquisition of the property. Therefore, the 'bundle of rights' which either Bell or the Trustee acquired upon obtaining title to the property did not include the right to develop the lots without restrictions."[55]

Further, it is not enough to argue that FPI was aware of the Clean Water Act. Even if the "notice defense" were valid, the government would have to show that FPI was on notice that the Clean Water Act prohibited development of the lakebottom parcel. The Act itself does not prohibit dredging and filling ***per se***. Indeed, the Corps of Engineers' former District Engineer, Col. Charles S. Thomas, testified that the purpose of Section 404 of the Clean Water Act is to consider the permissibility of fill in waters of the United States. Permits are sometimes granted to fill waters of the

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[54] 255 Va. 395, 498 S.E.2d 414 (1998).

[55] ***Id.*** at 401.

United States and sometimes permits are granted for fill which is to be used for residential sites in waters of the United States. Thomas testimony, JA 571:25-572:12. It is legal to place fill in a special aquatic site such as Big Bear Lake so long as one has a Section 404 permit. Thomas testimony, JA 575:25-576:5.

FPI had obtained all state and local approvals necessary to dredge the lakebottom parcel, including a waste discharge permit from the Santa Ana Regional Water Quality Control Board, a 1603 permit from the California Department of Fish and Game, a Shorezone Alteration permit from the water district, and a grading permit from the City of Big Bear Lake. App. B12-13. As the Court of Federal Claims found, "the only remaining regulatory hurdles were within the jurisdiction of the Federal Government." App. B13.

The fact that numerous dredge and fill projects had taken place in Big Bear Lake at the time of the permit application gave petitioner every reason to believe its project would be approved. Foulkes testimony, JA 232:22-235:2; Dodson testimony, JA 433:15-434:12. ***Lucas*** [56] declares:

> "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so ....) So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant."

It is evident, as set forth above, that this important issue deserves the attention of this Court.

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[56] 505 U.S. at 1031.

CONCLUSION

Our takings jurisprudence largely rests on the recognition that private property rights are inextricably linked with individual liberty and autonomy.[57] As this Court has recognized, property owners can suffer a unique injury--regardless of the scale of the government's intrusion.[58]

In the subject instance, FPI owns two distinct and severable parcels. Therefore, the parcel acquired by inverse condemnation constitutes the relevant parcel. Even if they were deemed to be part of a simple nondistinct ownership, a takings still would occur if the regulation precludes use of an identifiable, discrete piece of property even though the parcel acquired forms only a portion of the larger parcel.

This Court should grant this petition and address the issue left open in ***Lucas*** of categorical takings and the issue of the relevant parcel. The facts of this case offer this Court the opportunity to provide the much-needed guidance to the lower federal and state courts and to establish a uniform base of constitutional protection under the Fifth Amendment.

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[57] ***See, e.g.,*** Roger Pilon, ***Property Rights, Takings, and a Free Society***, in ***Public Choice and Constitutional Economics*** 151, 176 (J. Gwartney & R. Wagner eds, 1988) ("property rights are at the very heart of a free society, serving to define the normative relationships among its members and to enable those individuals to pursue their various ends free from the interference of others").

[58] ***Loretto v. Teleprompter Manhattan CATV Corp.***, 458 U.S. 419, 436 (1982).

Similarly, this Court should grant this petition to establish once and for all that illegal regulatory practices are not legalized by the mere transfer of property ownership. When one transfers a property interest, it is accompanied by all related existing and future rights against government's illegal practices.

For the reasons set forth above, petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari.

DATED: August 13, 1999.

Respectfully submitted,

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APPENDIX A

Copr. (C) West 1999 No Claim to Orig. U.S. Govt. Works
177 F.3d 1360
(Cite as: 177 F.3d 1360)

FOREST PROPERTIES, INC.(now known as RCK Properties, Inc.), Plaintiff-Appellant,
v.
UNITED STATES, Defendant-Appellee,
and
Big Bear Municipal Water District, Defendant-Appellee.
No. 97-5145.
United States Court of Appeals,
Federal Circuit.
May 19, 1999.

John H. Findley, of Sacramento, California, argued for plaintiff-appellant. With him on the brief were Ronald A. Zumbrun and Meriem L. Hubbard.

Andrew C. Mergen, Attorney, Environmental and Natural Resources Division, U.S. Department of Justice, of Washington, DC, argued for defendant-appellee, United States. With him on the brief were James F. Simon, Acting Assistant Attorney General, Edward J. Passarelli, Alan Brenner, and John A. Bryson, Attorneys.

W. Keith Lemieux, Lemieux & O'Neill, of Westlake Village, California, for defendant-appellee, Big Bear Municipal Water District.

Before LOURIE, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and RADER, Circuit Judge.

FRIEDMAN, Senior Circuit Judge.

This appeal challenges the Court of Federal Claims' decision that the United States did not take the appellant's real property when it denied the appellant a permit to dredge and fill certain underwater lake-bottom property. We agree that there was no taking and therefore affirm the judgment dismissing this suit for just compensation.

I

This case grows out of the planned residential development of two segments of property. The first segment is a 53 acre tract of upland contiguous to Big Bear Lake (the Lake) in Southern California. The second is 9.4 acres of lake-bottom contiguous to the aforementioned upland. The appellant Forest Properties, Inc. (Forest) and Big Bear Properties, Inc. (Big Bear) are, respectively, commonly-owned real estate development and real estate holding companies.

In 1969, Big Bear purchased 2500 acres of land adjoining the Lake for about $4 million. As part of the same contract, it also received a 20-year irrevocable option from a local water company to purchase up to 200 acres of lake-bottom land at $1,000 per acre. The option could be exercised only by an entity (Big Bear or a successor) that owned the land adjacent to the optioned lake-bottom land. As the lake was quite shallow, any use of it would require filling and/or dredging, and the water company had the right to approve any plans for doing so.

In the early 1980's, the number of acres subject to the option was reduced in the settlement of a dispute between Big Bear and the successor water district (the

appellee Big Bear Municipal Water District) over the validity of the option. As part of the settlement, the water district approved Big Bear's tentative plan to fill and create housing sites on 9.4 acres of lake-bottom off of Eagle Point, a particularly scenic spot. The settlement also provided that "[t]he deed of the District conveying the Lake Bottom Land . . . shall contain a reversionary clause under which title to [the lake-bottom] shall revert to the District if the proposed excavation and filling . . . shall not be completed within three years after the date of said deed."

The 9.4 acres of lake-bottom were wetlands. The Federal Water Pollution Control Act Amendments of 1972 prohibited dredging and/or filling "navigable waters" without a permit obtained under Section 404 of those amendments. *See* Pub.L. No. 92-500, § 404, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1344). In the mid-1970's, the Army Corps of Engineers promulgated regulations defining "navigable waters" to include wetlands. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) (validating the Corps' interpretation).

The Corps administers the Section 404 permit program, *see* 33 U.S.C. §§ 1344(a), (d) (1988), in accordance with guidelines developed in conjunction with the Environmental Protection Agency, *see id.* § 1344(b) – the Corps must make a "public interest review" of all permit applications, *see* 33 C.F.R. § 320.4(a)(1) (1988). In relevant part, these guidelines provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." 40 C.F.R.

§ 230.10(a) (1988). A housing development is considered a non-water dependent project – one that "does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose." *Id.* § 230.10(a)(3). For such projects, the guidelines create two presumptions: (1) that "practicable alternatives that do not involve [wetlands] are presumed to be available, unless clearly demonstrated otherwise," and (2) that "all practicable alternatives . . . which do not involve a discharge into [protected wetlands] are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." *Id.* As a practical matter, this means that few, if any, dredge or fill permits will be granted for the construction of housing.

In March 1988, Big Bear applied to the local Corps office for a Section 404 permit for "a dredge and fill of approximately nine acres . . . at Big Bear Lake in conjunction with a residential subdivision that will contain waterfront lots and a small marina. * * * A total of 62 acres (9 acres of filled area) will be developed with approximately 100 lots." The proposed fill would have created three peninsulas jutting out into the lake, and would have added numerous prime, lakefront lots to the development.

After filing the permit application, Big Bear, in May 1988, sold 53 acres of the uplands to Forest for $3.6 million. Five months later, in October 1988, Big Bear assigned to Forest the option to the 9.4 acres of lakebottom, without additional payment. The owner of Forest and Big Bear stated that the $3.6 million was consideration for both the uplands and the option. Forest also took over the Section 404 permit application.

Forest exercised the option by entering into a contract to purchase from the water district the lake-bottom land. It also agreed with the water district to postpone the closing under the contract, thereby delaying the execution of the deed and avoiding the three year dredge-and-fill period established by the settlement agreement. By entering into the contract, Forest obtained equitable title to the lake-bottom land under the doctrine of equitable conversion. *See County of Santa Clara v. Curtner*, 245 Cal.App.2d 730, 54 Cal.Rptr. 257, 261 (Cal.Ct.App.1966).

In February 1989, however, the Corps told Forest that "[i]f we were asked for a final decision at this time with the information we currently possess, our recommendation to the District Engineer would be that the projects do not meet [the] criteria for permit issuance." Forest then modified its development to provide a "[r]evised [p]roject [that] involve[d] the creation of 123 lots on 57.6 acres of land including the planned 4.4 acres of net fill." These 4.4 acres had only one peninsula instead of three and the change apparently lessened the adverse effect of the development on the wetlands environment.

By 1991, this new, smaller development had secured the necessary state permits for the lake-bottom land. In February 1992, however, the Corps denied the permit. The Corps concluded that Forest's project could satisfy neither the Section 404 guidelines – mainly because Forest had not rebutted the presumption that there were available, less adverse "practicable alternatives to the proposed discharge" – nor the Corps' public interest review. As an alternative, the Corps suggested "a revised development proposal that would allow other possible

uses of the Eagle Point property, such as higher-density lots on the available upland portions of the property."

Forest did not seek administrative or judicial review of the Corps' denial of the permit. It revised its development plan, however, to eliminate the filled peninsula and proceeded to develop the upland. Forest created 106 lots with a market price of about $12 million, at a cost of $7.1 million (the $3.6 million purchase price plus development costs). Forest has sold a number, but not all of the lots. Forest estimates that the additional lots on the proposed peninsula would have provided an additional profit of $2.36 million and claims that its equitable title to the lake-bottom now is worthless.

Forest filed the present suit in the Court of Federal Claims, seeking just compensation for the government's alleged taking of its property. It argued that the denial of the permit was a taking because it both deprived Forest of productive use of the lake-bottom land and would result in title to the lake-bottom land reverting to the water district. After a trial, the court held that there had been no taking and dismissed the complaint. In a 55-page opinion that discussed the issues in detail, the court held that because the regulation deprived Forest of only a small portion of the entire development and because the development as a whole was still profitable, "the economic impact of the regulation is not sufficiently severe to constitute a taking." *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 80 (1997).

II

The determination whether the government's denial of a permit constituted a taking of Forest's real property, for which the Fifth Amendment mandates the payment of just compensation, involves three inquiries: (A) whether the taking alleged was physical or regulatory; (B) if the alleged taking was regulatory, what was the relevant parcel for determining the economic impact of the regulation, *see Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180 (Fed.Cir.1994); and (C) did the regulatory action actually constitute a taking, *see id.* at 1181-82.

A. A physical taking of land occurs when the government itself occupies the property or "requires the landowner to submit to physical occupation of its land," *Yee v. City of Escondido*, 503 U.S. 519, 527, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), whether by the government or a third party, *see Preseault v. United States*, 100 F.3d 1525, 1551 (Fed.Cir.1996) (en banc). In a regulatory taking the government prevents the landowner from making a particular use of the property that otherwise would be permissible. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Such a taking may "den[y] all economically beneficial or productive use of land" (a "categorical" taking), *id.* at 1015, or have "crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking,' " *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1570 (Fed.Cir.1994).

Here, as the Court of Federal Claims pointed out, "[t]here was neither a physical taking nor invasion of this

property." The Corps' denial of the permit merely prevented Forest from making a particular use of the lake-bottom, namely, dredging and filling it and then developing building lots on the new dry land. That is a classic example of a regulatory taking claim.

This court without discussion twice has treated the same government action – denial of a permit under Section 404 of the Clean Water Act – as involving a claim for a regulatory taking. *See Loveladies Harbor,* 28 F.3d at 1173; *Florida Rock,* 18 F.3d at 1562.

Forest, however, contends that this case involves a physical taking because the effect of the denial of the permit will be the reversion to the water district of Forest's interest in the lake-bottom property, since the lake-bottom would not be excavated and filled within three years after execution of the deed to the property. This, however, would be attributable not to the government's action, but to the prior contractual arrangement between Forest and the water district for such a reversion. The government itself has not required Forest to give up or to submit to the physical occupation of the submerged land. *See Yee,* 503 U.S. at 527-28.

Indeed, Forest's argument is abstract and conjectural. The reversionary period is triggered by the execution of the deed. As far as it appears from the record, the deed has not been executed and Forest continues to retain its equitable title to the submerged land. Unless and until Forest obtains the deed, the three-year period for dredging and filling the lake-bottom will not begin to run, and it cannot be said whether or when that will ever occur.

B. We also agree with the Court of Federal Claims that the relevant parcel for takings analysis is the entire 62 acre project. This relevant parcel inquiry is critical because "our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). *See also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) ("In deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the nature and extent of the interference with rights in the parcel as a whole.").

With regard to the relevant parcel, "[o]ur precedent displays a flexible approach, designed to account for factual nuances." *Loveladies Harbor*, 28 F.3d at 1181. It requires courts to focus on the economic expectations of the claimant with regard to the property. *See Keystone*, 480 U.S. at 500-01. Where the developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel. *See id.*; *Naegele Outdoor Adver. v. City of Durham*, 844 F.2d 172, 176 (4th Cir.1988); *K & K Constr., Inc. v. Department of Natural Resources*, 456 Mich. 570, 575 N.W.2d 531, 535-37 (Mich.), cert. denied, ___ U.S. ___, 119 S.Ct. 60, 142 L.Ed.2d 47 (1998).

The Court of Federal Claims found that the relevant parcel was the entire 62-acre project. In so finding, the court properly "ocus[ed] [sic] on how the economic expectations of the claimant, with respect to the parcel at issue, have shaped the owner's actual and projected use of the property."

The record shows that from the outset, the development was treated as a single integrated project (called Eagle Point Estates) comprising the two tracts. At the time Forest acquired its interest in the properties, it was understood that the two portions would be developed as a single project. As the trial court found, "from the time of the purchase of the upland property, [Forest's] economic intentions were to utilize the lakebottom acreage and the upland parcel in conjunction with each other as one income-producing unit." In fact, only the owner of the adjacent upland property could exercise the option on the lake-bottom land. The 1988 application for the Section 404 permit described a single project of "[a] total of 62 acres (9 acres of filled area) * * * developed with approximately 100 lots." After that application was filed, Forest purchased the 53 upland acres for $3.6 million and obtained the option on the submerged land without additional payment; the record indicates that the $3.6 million was the consideration for both parcels.

Forest points to other evidence in the record which, it contends, supports the use of the 9.4 acres of submerged land as the relevant parcel for the taking analysis. It notes that it had different kinds of title to the lake-bottom (equitable ownership) and the dry land (fee), that it acquired its interest in the two entities in different transactions at different times, that different local government authorities had regulatory jurisdiction over the two locations, and that the two segments were capable of separate development. In holding that the entire 62 acre project was the relevant parcel, however, the Court of Federal Claims properly looked to the economic reality of the arrangements, which transcended these legalistic bright

lines, and it did not commit clear error in so doing. *Cf. Loveladies Harbor*, 28 F.3d at 1181 (reviewing the relevant parcel determination for clear error).

C. The ultimate issue in this case is whether the Corps' denial of a permit to dredge and fill the 9.4 acres of lake bottom was a regulatory taking of the entire 62 acre parcel. "Several factors" . . . have particular significance" in the "essentially ad hoc, factual inquiries" that determine whether a government regulation constitutes a regulatory taking: (1) "The economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124. *See also Florida Rock*, 18 F.3d at 1564. In 1992, however, the Court in *Lucas* "dramatically change[d] the third criterion, from one in which courts, including federal courts, were called upon to make ad hoc balancing decisions, balancing private property rights against state regulatory policy, to one in which state property law, incorporating common law nuisance doctrine, controls." *Loveladies Harbor*, 28 F.3d at 1179. *See also Creppel v. United States*, 41 F.3d 627, 631 (Fed.Cir.1994).

Applying these factors, the Court of Federal Claims concluded: Under the regulatory/partial taking analysis, the plaintiff is unable to demonstrate that there was any deficiency in the character of the Government's action, nor is the plaintiff able to demonstrate that it had reasonable, investment-backed expectations in the development of the lakebottom property in the manner in which it had proposed. Finally, there is substantial economic value remaining in the parcel as a whole, which supports the

conclusion that the Government's denial of the plaintiff's permit only caused a noncompensable, mere diminution in the value of its property, which is not substantial enough to protect as a taking.

We discuss these factors in reverse order.

1. The character of the government action does not have an impact on this case. The Court of Federal Claims correctly found that the dredging and filling of the submerged area to permit its use for building would not constitute a nuisance under California law.

2. The trial court correctly held that the denial of the permit has not significantly "interfered with distinct investment-backed expectations." We have recognized that such expectations must be reasonable. *See 767 Third Ave. Associates v. United States,* 48 F.3d 1575, 1581 (Fed.Cir.1995).

In 1988, when Forest purchased the 53 acres of upland and the option to acquire the 9.4 acres of lakebottom from Big Bear, the Corps' guidelines governing the issuance of Section 404 permits under the Clean Water Act had been in effect for a number of years. As explained above, those guidelines made it clear that filling wetlands to construct housing on the reclaimed land was disfavored and that it was most unlikely that such a project would be approved. Indeed, three years before the Corps denied the permit, it told Forest that on the basis of the information it then had, it would recommend denial. The investment-based expectation criterion "limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation. One who buys with knowledge of

a restraint assumes the risk of economic loss." *Creppel*, 41 F.3d at 632. Although Forest unquestionably hoped to obtain the permit and realize its development goals, that hope is not enough to show a reasonable investment-backed expectation that might be protected by the Takings Clause.

3. The "economic impact of the regulation upon the claimant" is "measured by the change, if any, in the fair market value caused by the regulatory imposition." *Florida Rock*, 18 F.3d at 1567. Forest, however, failed to introduce convincing evidence to show the amount, if any, by which the value of the relevant property – the 62 acres – was reduced by the denial of the permit.

Forest's evidence showed the listed selling prices for the developed upland lots, and the company's ultimate owner, Mr. Colburn, indicated that those prices were the fair market value of the land. There was also evidence showing the anticipated selling price of the lots that would be created by the draining and filling of the 9.4 underwater acres, and the profit on their sale that Forest allegedly lost through the denial of the permit.

Those prices, however, reflect the development of the lots following the denial of the permit, and do not necessarily reflect their value immediately after the permit was denied. This was not evidence of the amount by which the fair market value of the 62 acres was reduced by the denial of the permit. *See, e.g., Loveladies Harbor*, 28 F.3d at 1178. The profit that Forest allegedly lost does not necessarily reflect the reduction in market value the denial of the permit caused.

This case stands in sharp contrast to *Loveladies Harbor*, where the evidence led the Court of Federal Claims to find that the fair market value of the relevant parcel (there the submerged land) was $2,658,000 before the denial of the fill permit and only $12,500 after the denial – a diminution in value of 99%. *See id.* We held that "The trial court's conclusion that the permit denial was effectively a total taking of the property owner's interest in these acres is fully supported in the record: there is no clear error in that conclusion." *Id.* at 1182 (footnote omitted).

There are no comparable findings regarding the amount of the reduction in the fair market value of the relevant parcel here that resulted from the denial of the permit, and insufficient evidence in the record upon which such finding could be made. Forest had the burden of proof to establish a regulatory taking, and it failed to carry that burden. Indeed, the record shows that, despite the denial of the permit, the value of the 62 acres increased from the $3.6 million Forest paid in 1988 in what it asserts was an arms length transaction with Big Bear, to more than $12 million today. That result itself undermines Forest's contention that its property was taken.

In sum, we have no reason to disagree with the Court of Federal Claims' conclusion, grounded on the record, that the denial of the permit "did not prevent all or substantially all of the economically viable use of the property, and, thus, the economic impact of the regulation is not sufficiently severe to constitute a taking."

CONCLUSION

The judgment of the Court of Federal Claims is AFFIRMED.

APPENDIX B

FOREST PROPERTIES, INC.,

v.

The UNITED STATES,

and

Big Bear Municipal Water District, third party.

No. 92-851L.

United States Court of Federal Claims.

Aug. 6, 1997.

John H. Findley, Sacramento, CA, for plaintiff. Ronald A. Zumbrun and Meriem L. Hubbard, of counsel.

Edward J. Passarelli and Alan Brenner, Washington, DC, with whom was Assistant Attorney General Lois J. Schiffer, for defendant. John Gleason, U.S. Army Corps of Engineers, and Daniel W. Kilduff of counsel.

Wayne K. Lemieux, Westlake Village, CA, for third party.

OPINION

YOCK, Judge.

This is a regulatory taking action brought by the plaintiff after the Federal Government acting through the United States Army Corps of Engineers denied a dredge and fill permit for the development of land owned by the plaintiff at Big Bear Lake in San Bernardino County, in southern California. Trial was held on September 9-12,

1996, at the United States Courthouse, Pasadena, California.

For the reasons that follow, the Court finds that the plaintiff's property was not taken in violation of the Fifth Amendment to the United States Constitution.

Statement of Facts

The plaintiff, Forest Properties, Inc. ("FPI"), along with Big Bear Properties, Inc. ("BBP"), are members of a group of companies, all of which are owned by RCK Properties, Inc., which, in turn, is ultimately owned by Mr. Richard W. Colburn and his family. BBP is in the business of real estate holdings, and it generates business revenues by selling real estate property to real estate developers, one of which was FPI. FPI is in the business of real estate development, which, in this case, involved acquiring a parcel of real estate, obtaining the necessary governmental permits to subdivide it, putting in roads and other necessary improvements, and finally selling the improved lots to the general public for the construction of single family housing.

In January 1969, BBP acquired approximately 2500 acres of upland property contiguous to Big Bear Lake in San Bernardino County, California, from the Big Bear Development Company for approximately $4 million. As part of this sale, the Bear Valley Mutal Water Company also entered into a binding contract with BBP for an irrevocable, 20-year option on lakebottom land. If exercised within 20 years, BBP, as optionee, would be able to purchase, at the price of $1,000 per acre, up to 200 acres

of lakebottom property within Big Bear Lake. Importantly, a number of conditions were attached to the option for the acquisition of the lakebottom land. For example, by the terms of the option agreement, the optionee could only exercise the option to the lakebottom land if the optionee also owned the adjacent upland property above the high water line. Moreover, in order to retain ownership of the lakebottom land property, any planned fill of the lakebottom property had to be completed within three years after acquiring legal title to the property. Finally, the optionor had to be afforded the right to review and to conceptually approve the design of any planned fill of the lakebottom property.

Twelve years later, in 1981, this option became the subject of a lawsuit filed in the Superior Court of the State of California for the County of San Bernardino, by BBP against the Big Bear Lake Municipal Water District ("Municipal Water District").[1] By this time, the Municipal Water District had succeeded the Bear Valley Mutual Water Company as the party in interest to the option. BBP decided to exercise its option rights to a portion of the lakebottom land, but the Municipal Water District argued that, even though it was the successor-in-interest to the Bear Valley Mutual Water Company, it was not bound to the option agreement. On September 22, 1982, the Superior Court of the State of California for the County of San

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[1] On June 2, 1993, this Court granted the plaintiff's motion to name the Big Bear Municipal Water District as a third party, pursuant to RCFC 14. As a third party, the Municipal Water District was not actively involved in the litigation of this case, although it did monitor the proceedings throughout the trial of this case.

Bernardino found that the option was binding on the Municipal Water District, and, thus, BBP owned the right to purchase and fill up to 200 acres of lakebottom property in Big Bear Lake. *Big Bear Properties, Inc. v. Big Bear Mun. Water Dist.*, No. VCV-2782 (Cal.Super.Ct. Sept. 22, 1982).

To avoid further appeals and litigation, BBP and the Municipal Water District entered into a settlement agreement on February 18, 1983, ("1983 agreement") that restricted the total amount of lakebottom property that could be acquired by BBP to some 28.7 acres. Additionally, both parties agreed that the lakebottom property could only be used for residential housing purposes and that the total amount of acreage that BBP could purchase would be limited to 9.4 acres, located adjacent to or abutting an approximately 67-acre parcel on the south shore of Big Bear Lake known as Eagle Point.[2]

The 1983 agreement also included tentative development plans for the lakebottom parcel adjacent to the Eagle Point area of Big Bear Lake. The development plan showed three peninsulas, plus wildlife habitat islands located offshore of the three peninsulas. Under the 1983 agreement, the Municipal Water District agreed not to "raise any objection * * * based upon issues of development design, density and related esthetic [sic] and environmental considerations" to the plans attached to the agreement. The 1983 agreement provided that, as a result of any exercise of the option by BBP, the deed conveying

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[2] The Eagle Point area of Big Bear Lake was aptly named. The area is a natural gathering, feeding, and foraging area for the American bald eagle.

the lakebottom land would contain a reversionary clause. This reversionary clause stated that title to the land conveyed would revert to the Municipal Water District if the proposed dredging and filling was not completed within three years after the date of the deed.

On March 29, 1984, the Municipal Water District, for valuable consideration, conveyed a 10-year conservation easement of lakebottom property near Eagle Point ("1984 easement") to the United States Forest Service for the purposes of preserving and improving an eagle habitat. By its terms, the 1984 easement expired in 1994. This 1984 easement was not intended to interfere with any rights of BBP. However, the metes and bounds description of the 1984 easement, drawn up by the engineer working for the Municipal Water District, inadvertently overlapped the lakebottom property on which BBP held an option. Importantly, the Municipal Water District was under a California court order that had upheld BBP's option and, thus, the Municipal Water District presumably lacked the intent to interfere with BBP's rights to the lakebottom option. Consequently, the Municipal Water District's unfortunate titling mistake created a cloud on the title to the lakebottom property adjacent to Eagle Point.

On May 3, 1988, BBP transferred approximately 53 acres of its upland property at Eagle Point to FPI by a corporation grant deed for $3.6 million. This deed did not specifically include the adjacent lakebottom option rights in the transfer of ownership from BBP to FPI. Apparently, FPI recognized that a number of issues were complicating

the lakebottom property transfer.[3] Although FPI had always planned to develop Eagle Point as one development ("Eagle Point Estates"), it decided to separate the acquisition of the two parcels of land in order to avoid a premature reversion of the lakebottom parcel to the Municipal Water District. Thereafter, on October 17, 1988, some five months later, BBP assigned the option rights to the 9.4 acre lakebottom property adjacent to Eagle Point to FPI. The document effecting this assignment did not indicate the amount of compensation for this option but merely indicated that the property was transferred for "valuable consideration." Evidence in the record confirms that no additional consideration beyond the $3.6 million paid for the upland 53 acres was paid by FPI to BBP for the 9.4-acre option.

In order to exercise the option, but to avoid a future reversion of the lakebottom property, Mr. Stephen Foulkes, Vice President of FPI, and Mr. James Good, FPI's attorney, negotiated an informal agreement with Mr. Jere Mitchell, General Manager of the Municipal Water District, and Mr. Wayne Lemieux, Sr., the Municipal Water District's attorney, regarding the procedures for exercising the option and purchasing the lakebottom property. Apparently, all of the parties to the option agreement were eager to devise a flexible arrangement that would legally exercise the option immediately but permanently convey legal title at a later date. In order to achieve this

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[3] It is important to note that FPI and its sister company, BBP, shared many of the same officers. Therefore, FPI would have been aware of all of the terms of the option, including the reversionary clause in the 1983 agreement.

mutual goal, their subsequent arrangement had to address a number of vexing problems.

First, the 20-year option was due to expire at the end of that year, *i.e.*, 1988. Although it is not clear from the record or from the testimony of the witnesses, FPI and the Municipal Water District apparently believed that extending the option was not the preferred course of action. The second problem concerned the time constraints imposed upon BBP (and subsequently FPI) by the reversionary clause in the option and the 1983 agreement. Because the reversionary clause stated that title to the land conveyed would revert to the Municipal Water District if the dredging and filling was not completed within three years, FPI believed that the title to the lakebottom property might eventually revert to the Municipal Water District because the estimated time required to obtain the regulatory approvals could exceed three years. Third, in the course of developing the lakebottom property, FPI would have to obtain the approval of several federal and state agencies. FPI surmised that a number of minor changes to the Eagle Point Estates project might be required in order to receive the various regulatory approvals. However, the option and the 1983 agreement contemplated that the Municipal Water District "review, and to approve or disapprove any specific plan for excavation and filling * * * of Lake Bottom Land" to be purchased by the optionor. Specifically, the Municipal Water District had previously informed FPI that, if any changes occurred to the project, the District would reevaluate the shore zone alteration permit previously issued to FPI. Finally, the 1984 easement prevented the Municipal Water District from conveying clear and legal title to the lakebottom

property. Therefore, since the three-year reversionary clause period would commence *after the date of the deed*, FPI (and, to a lesser extent, the Municipal Water District) felt that it was more prudent to postpone the transfer of legal title of the lakebottom property until these problems were solved to the parties' mutual satisfaction.

Thus, in order to exercise the option before it expired and to delay the commencement of the reversionary clause, the two parties agreed to let FPI exercise the option, thereby obtaining equitable title to the lakebottom land, and to delay the transfer of legal title until all of the regulatory hurdles had been cleared. In pursuance thereof, by letter of October 19, 1988, Mr. Good, on behalf of FPI, forwarded two draft letters to Mr. Lemieux for his review. One draft letter purported to exercise FPI's option with respect to the lakebottom property adjacent to Eagle Point, while the second draft letter suggested deferral of the *close*[4] of escrow "until the exact acreages [sic] are known following all the regulatory approvals, and particularly in view of the title problem with respect to Eagle Point."

By letter dated November 29, 1988, to Mr. Mitchell, Mr. Foulkes, on behalf of FPI, claimed to have exercised the option, stating that FPI "hereby gives the District notice of its exercise of the option to purchase, as modified by the [1983] Agreement, with respect to the acres

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[4] Apparently, the initial suggestion by Mr. Good to delay the *closing* of the escrow account, as opposed to the *opening* of the account, was a mistake. In the subsequent letter describing the purchase of the lakebottom property, the parties mutually agreed to defer the *opening* of the escrow account.

abutting the real property described in paragraph 2.b. of the [1983] Agreement, referred to as 'Eagle Point'." In a letter dated November 30, 1988, sent to Mr. Lemieux, Mr. Good memorialized the agreed procedure to complete the purchase and transfer of the legal title to the lakebottom property by postponing the *opening* of the escrow account.[5] Mr. Lemieux, on behalf of the Municipal Water District, signed this letter as approved on December 5, 1988, 27 days before the expiration of the 20-year option.[6] At this point, FPI believed it was the equitable owner of approximately 9.4 acres of lakebottom property adjacent to Eagle Point and the 53-acre upland parcel also owned in fee by FPI.

During the course of the FPI development at Eagle Point, BBP (and subsequently FPI) had sought to obtain a number of federal, state, and local permits. Prior to the sale of the Eagle Point property to FPI, BBP had commenced the process of obtaining the necessary permits. The first stage in the process required BBP to assist the lead state agency in the creation of an Environmental Impact Report ("EIR") pursuant to the California Environmental Quality Act ("CEQA"). In this first EIR, the Municipal Water District was identified as the lead agency for the State of California. Thus, BBP submitted various plans for the Eagle Point Estates project and a draft EIR to the Municipal Water District.

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[5] *See* note 4.

[6] During a meeting of the Municipal Water District's Board of Directors on July 18, 1996, the Board approved an oral resolution finding that the option granted in the 1983 agreement had been validly exercised by FPI in 1988.

On June 2, 1987, the Municipal Water District issued a Notice of Preparation of Draft EIR for the Eagle Point Estates project. The notice described the project as envisioning "approximately nine (9) acres of new land extending beyond the current highwater line of the lake. Combined with the approximate 53 acres of land above the highwater line at the site * * * ." The plans for the project at this point contained three peninsulas, offshore habitat islands for eagles, and a residential island to the east of the most eastern of the three peninsulas.

In June 1987, BBP hired an environmental consultant, Mr. Tom Dodson, to assist BBP in the preparation of various environmental reports that were to be incorporated into the EIR. In October 1987, Mr. Dodson completed a study of the Eagle Point Estates property, which was entitled "A Biological Assessment of the Eagle Point Residential Subdivision," and this study was a part of Eagle Point Estates' overall EIR. The study found that the upland property of some 53 acres at Eagle Point contained 15 rare plant species, including two species that were listed as "endangered species" in rare montane wet meadow habitat. The study noted that Eagle Point had the "highest degree of floral endemism in California and possibly the continental United States for such a small area." Moreover, Eagle Point was identified as a " 'key perching and foraging habitat' for wintering bald eagles," which, at that time, were designated as an endangered species by the United States Government.

On July 5, 1988, the Municipal Water District issued the "Conditions of Approval of Eagle Point Property" and a final EIR was prepared in August 1988 that approved the Eagle Point Estates project. Claiming that

the EIR was inadequate under CEQA, however, on August 10, 1988, the State of California challenged the validity of the EIR in the Superior Court of the State of California for the County of San Bernardino. On April 25, 1989, the Superior Court ruled that the EIR was inadequate under CEQA and ordered the preparation of a new EIR. *State v. Big Bear Mun. Water Dist.*, No. BCV-4778 (Cal.Super.Ct. Apr. 25, 1989). The practical effect of this judgment was to void all previous permits approved pursuant to the August 1988 EIR and to force FPI to begin the regulatory process all over again.

In response to this setback, FPI aggressively attempted to correct the EIR. The Eagle Point Estates' design plan was modified by reducing the project into one described as "53.36 acres existing plus 5.4 acres lake bottom."[7] A second EIR was prepared that incorporated improvements to the first EIR by refining its mitigation measures. For example, FPI retained Dr. Charles Goldman, professor of ecology and limnology at the University of California, Davis, and Dr. John Reuter in order to design a dredge and fill procedure for the project's lakebottom property. Eventually, the final design of the Eagle Point Estates project included about 25 different measures designed to protect the environment.

Throughout the development process of the Eagle Point Estates project, FPI interacted with a number of federal and state agencies in order to enlist support and approval for its project. Among the federal agencies with

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[7] As described in FPI's application for approval of the tentative tract map by the City of Big Bear Lake.

jurisdiction over the property was the United States Department of the Interior, Fish and Wildlife Service ("FWS"). Although the FWS would ultimately not support the project, it offered a variety of suggestions to increase mitigation measures and to decrease any potentially harmful effects on the environment. FPI went to great lengths to develop additional mitigation measures and to integrate the FWS's suggestions into the second EIR. For example, FPI eliminated two of the project's proposed three peninsulas, shifted the fill to the far eastern edge of the project, placed eagle perch trees on open space lots, protected every part of the endangered species plant habitat, provided one-for-one mitigation for wetland habitat, and dedicated nearly 16 acres of upland property (over 25 percent of the project's total area) to open space on the Eagle Point Estates project site with an endowment for maintaining and managing it.

With regard to the State of California, all indications were that the Eagle Point Estates would obtain all regulatory approvals. The City of Big Bear Lake, the new lead agency under CEQA for the second EIR, issued its Notice of Public Hearing on the Final Environmental Impact Report for the project on July 17, 1991. On July 25, 1991, the Community Development Department of the City of Big Bear Lake issued its Notice of Determination, stating that the EIR was prepared for the Eagle Point Estates project, and found that the project would not have an adverse effect on the environment. On July 30, 1991, the City of Big Bear Lake issued its approval of FPI's Eagle Point Estates subdivision in its Mitigation Measures and Conditions of Approval for Eagle Point Estates. Finally,

the Municipal Water District issued its Notice of Determination, approving FPI's shorezone alteration permit for Eagle Point Estates, conditioned on the observance of mitigation factors. As far as the State of California was concerned, the project could proceed.[8] There were no legal challenges to this revised EIR and, thus, the only remaining regulatory hurdles were within the jurisdiction of the Federal Government.

Previously, by application dated March 16, 1988, BBP had submitted Application No. 88-160, Department of the Army, Corps of Engineers ("Corps"), for a section 404 permit under the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 *et seq.* (1994) ("Clean Water Act"), to dredge and fill 9.4 acres of lakebottom property, included in the Eagle Point Estates project, in order to build residential lots. The permit application described the project as "[a] total of 62 acres (9 acres of filled area) * * * developed with approximately 100 lots." At the time of the application, the proposed project had been somewhat modified by the deletion of the habitat islands and the residential island but still included the three peninsulas. By a letter dated April 4, 1988, the Corps notified BBP that it was reviewing the section 404 permit application and estimated that the processing time would be 60 to 90 days.

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[8] State and local approvals that were necessary in order to dredge the lakebottom parcel had been obtained, including a waste discharge permit from Santa Ana Regional Water Quality Control Board, a 1603 permit from the California Department of Fish and Game, a grading permit from the City of Big Bear Lake, and the aforementioned shorezone alteration permit from the Municipal Water District.

Upon the completion of the sale of the upland property at Eagle Point on May 3, 1988, but before the exercise of the option by FPI on December 5, 1988, Mr. Dodson informed the Corps, by a letter dated October 11, 1988, that FPI would assume the section 404 permit application, previously submitted by BBP, and would continue the procedure to gain approval of the section 404 permit application. Throughout its consideration of FPI's permit application, the Corps (and other federal agencies) expressed a willingness to work with FPI in developing additional information needed to demonstrate compliance with federal environmental regulations. In the period between March of 1988 and the end of 1991, FPI had numerous communications with various federal agencies, regarding its section 404 permit, culminating with a "Revised Project" presented to the Corps. The "Revised Project" proposed a development with 57.6 acres of land and 4.4 acres of lakebottom property with one peninsula requiring dredge and fill to accommodate residences, a marina, and other recreational amenities. As early as February 17, 1989, in a letter to FPI, however, the Corps was signaling that it might deny the 404 permit application.

> In order for permits to be issued for the proposed projects, they must be found to comply with the 404(b)(1) guidelines and be found not contrary to the public interest. If we were asked for a final decision at this time with the information we currently possess, our recommendation to the District Engineer would be that the projects do not meet either criteria for permit issuance and should be denied.

Eventually, as the Corps' review process dragged on, FPI requested a meeting with the Corps in order to clarify its present views on the issues of bald eagles, wetland habitat, aquatic habitat, endangered species, practicable alternatives, and the economics of the project. On January 22, 1992, after FPI had presented its views on these issues, Colonel Thomas, the district engineer responsible for the Corps' decision, addressed the FPI representatives. Although the parties had different interpretations of Colonel Thomas' conversation with FPI, neither party disputed that the greatest impediment to a section 404 approval was the on-site alternatives and the cost evaluations prepared with respect to the practicable alternatives to FPI's development plan. The permit requested was for the dredging and filling of the lakebottom property to create a peninsula on which approximately 14 expensive, single-family houses were to be built. Housing is generally considered to be a nonwater-dependent activity. Housing specifically, and nonwater-dependent activities in general, in special aquatic sites in waters of the United States, is almost always denied permits because the presumption exists that there are water-dependent practical alternatives in aquatic sites that are not as environmentally damaging as nonwater-dependent activities. Thus, FPI's dredge and fill permit request presented a difficult hurdle in its attempt to demonstrate a least damaging practicable alternative to the Corps.

One month later, on February 24, 1992, the Corps formally denied FPI's section 404 permit application for the lakebottom fill portion of the Eagle Point Estates project. In the letter detailing its decision, Colonel Thomas explained that the Corps denied the permit for

numerous reasons, such as concerns regarding water quality, the negative impact on endangered plant and animal species, and the belief on the part of the Corps that there were practicable alternatives to filling the Eagle Point Estates lakebottom property that would have less adverse effects on the environment. The decision letter stated in pertinent part:

> a. 404 (b)(1) guidelines:
>
> (1) There are practicable alternatives to the proposed discharge that would have less adverse effect on the aquatic ecosystem and those alternatives do not have other significant adverse environmental consequences.
>
> (2) The proposed discharge will result in significant degradation of the aquatic ecosystem under 40 CFR 230.10(b) and (c).
>
> (3) The discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem.
>
> b. Public interest factors:
>
> (1) Effects on special aquatic sites – the project would destroy approximately 7 acres of vegetated shallows below the ordinary high water line, and have at least 1.6 acres of impact on wetlands above the high water line.
>
> (2) Water quality – the project has the potential to reduce the water quality of Big Bear Lake and Summit Creek by increasing pollution from the developed areas, and increasing turbidity and polluted runoff during and after construction.
>
> (3) Mitigation – the mitigation proposed for this project is inadequate. Further, certain

uncompensated impacts such as the removal of shallow-water, near-shore habitat and the reduction in the value of bald eagle perch trees will occur. As such, the mitigation proposed would cause a substantial temporal loss in resource availability to wildlife.

(4) General environmental concerns – approximately 7 acres of special aquatic sites would be permanently destroyed by the project as proposed. One federally-designated endangered animal species, two federally endangered plant species, fifteen sensitive plant species, and their habitat would be negatively impacted.

(5) Shore erosion and accretion – a stable shore zone would be replaced by a shore zone which would require reinforcement to prevent erosion and accretion around the peninsula.

(6) The public and agency responses to the Public Notice and subsequent responses have been opposed to the project.

* * * *

In consideration of the public interest review factors mentioned above, I find that issuance of a Department of the Army permit for the project as proposed, as prescribed by regulations published in 33 CFR Parts 320 to 330, and 40 CFR Part 230, is contrary to the public interest and your permit request is hereby denied.

Finally, Colonel Thomas stated that the Corps would continue to consider any subsequent application for a section 404 permit that FPI might wish to submit.

By letter of March 5, 1992, addressed to the Corps, FPI responded to the permit rejection. This letter reflected

FPI's belief that the Corps was amenable to a new application addressing the concerns expressed by Colonel Thomas, in the denial of FPI's initial application, but retaining the plans to dredge and fill the lakebottom property as in the original permit application. However, FPI had misunderstood the extent of its permit problems, and a subsequent letter by Colonel Thomas, dated April 7, 1992, specifically stated:

> My letter of February 24, 1992, listed the justifications for permit denial. * * *
>
> My reference to a revised development proposal did not mention fill in the lake for the purpose of housing nor did I mean to imply that such fill had become acceptable to the Corps. Rather, I referred to a revised development proposal that would allow other possible uses of the Eagle Point property, such as higher-density lots on the available upland portions of the property.

Apparently anticipating the futility of obtaining a section 404 permit to dredge and fill the lakebottom property, FPI had modified the Eagle Point Estates project and submitted such a section 404 permit application on March 4, 1992. Consequently, FPI notified the Corps by letter dated August 14, 1992, that it intended to proceed with the development of the upland portion of Eagle Point Estates. Additionally, the letter stated FPI's intentions to dredge, but not fill, a small portion of the lakebottom land in order to provide recreational access to Big

Bear Lake for Eagle Point Estates residents.[9] The Corps did not assert jurisdiction over this planned dredging. Additionally, FPI successfully obtained two nationwide permits from the Corps to construct a bridge and utilities over a stream within the upland portion of the Eagle Point Estates.

Eventually, the modified Eagle Point Estates project was completed pursuant to amended plans that were developed as a result of the Corps' denial of FPI's section 404 permit application. Presently, Eagle Point Estates consists of 106 single-family lots located in the upland portion of Eagle Point.[10] A limited, recreational access to Big Bear Lake is provided to the residents via a pier on a small area of lakebottom property that was dredged by FPI. Nearly 16 acres of upland property have been dedicated to open site as environmental mitigation measures.

The total current listed sales price for the lots at Eagle Point Estates is $12,048,400. Mr. Richard W. Colburn indicated in his deposition that the fair market value of Eagle Point Estates is approximately the listed sales price for the lots, *i.e.*, $12 million. In a letter to the Bank of America dated June 9, 1992, Mr. Colburn also stated that the total development costs of Eagle Point

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[9] Although the fill portion of the project was never completed, some dredging was conducted that resulted in deeper water (and presumably a better dissolved oxygen content) in the dredged location. At the time, no Corps permit was required for such an operation limited to dredging.

[10] Plaintiff retains an area of undeveloped land at Eagle Point Estates that could be developed into an additional two or three saleable lots.

Estates (including land costs) would be about $7,100,000. As of August 30, 1994, the plaintiff had sold a total of 25 out of 106 lots in Eagle Point Estates for $3,547,900. All but one of the lots sold at or above the listed sales price, with the remaining lot sold to Mr. Foulkes at approximately cost value. In a letter to Mr. Colburn, fax dated July 3, 1991, Mr. Foulkes presented a financial evaluation of the Eagle Point Estates project in terms of its profit potential. He estimated that, if the 404 fill permit was not granted, the profit generated would range between $2 million and $4 million and, if the fill permit was granted, the profit would run between $3.6 million and $6.3 million. As of April 30, 1996, closed sales of 28 lots generated proceeds in the amount of $4,208,000, and Mr. Foulkes testified that as of September 1996, at least 33 lots had been sold, with others still in escrow. Mr. Colburn attributed the number of remaining unsold lots to the downturn in the real estate market in southern California. The loss of the 14 lots on the proposed peninsula amounted to a decrease in developable land of some 15 percent of the project, although the market value of the lakeshore lots would have been among the highest of all of the lots in the development.

On December 16, 1992, FPI filed a Complaint in this Court alleging an inverse condemnation. FPI believes that, by denying the section 404 permit, the Government effectuated a taking, which requires just compensation pursuant to the Fifth Amendment.

Discussion

The Fifth Amendment to the United States Constitution provides, in relevant part, that "private property [shall not] be taken for public use without just compensation." It is well established that a taking can be accomplished by governmental regulation. As the United States Supreme Court found in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." In *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), the Supreme Court stated that "application of a general zoning law to particular property effects a taking if the ordinance * * * denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 n. 36 [98 S.Ct. 2646, 2666 n. 36, 57 L.Ed.2d 631] (1978)."

Further, as the Supreme Court has held in *Pennsylvania Coal*, the question of whether or not the taking reaches "a certain magnitude" is one that is particularly fact dependent. *See Pennsylvania Coal*, 260 U.S. at 413, 43 S.Ct. at 159. The Supreme Court has "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and [has] relied instead on ad hoc, factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986).

In this regulatory taking case, the first matter this Court must decide is whether or not the plaintiff had a sufficient *ownership* or compensable interest in the land

allegedly taken so as to invoke the protection of the Fifth Amendment. Since this Court finds herein that FPI had a compensable property interest in the lakebottom land, the next step is to determine which taking analysis is appropriate in this case, *i.e.*, a categorical taking analysis (in which a physical occupation occurred or all beneficial or productive use of the property has been prohibited) or a regulatory or partial taking analysis (in which a regulation may have gone "too far" but stops short of a categorical taking). Critical to this Court's determination that the regulatory taking analysis is the appropriate method to use to analyze FPI's taking claim is its determination of the relevant parcel that has been allegedly taken. In this case, the Court finds that the parcel as a whole is the 62-acre Eagle Point Estates, which includes the 9.4 acres of lakebottom property and the inextricably linked 53 acres of upland property. Thus, only a small portion of the plaintiff's property has allegedly been taken, and, because a categorical taking did not occur, a regulatory or partial taking analysis is appropriate in this case.

Finally, the Court will analyze FPI's taking allegation utilizing the three factors identified in *Penn Cent. Transp. Co.*, 438 U.S. at 124, 98 S.Ct. at 2659. This Court will determine whether or not the denial of FPI's application for a 404 permit to dredge and fill constituted a taking by analyzing the character of the governmental action, the extent to which the regulation interfered with FPI's investment-backed expectations, and the regulation's economic impact on FPI. Under this three-tiered analysis, this Court concludes that FPI cannot establish a taking under the Fifth Amendment.

I. FPI's Property Interest in the Lakebottom Land.

In order for the plaintiff to maintain a taking action for just compensation under the Fifth Amendment, it must establish that it had an *ownership* interest in the land allegedly taken. Here, the plaintiff maintains that it has validly exercised an option that has given it equitable title to the 9.4 acres of wetlands contiguous to the 53-acre upland portion of the Eagle Point Estates development. It also owns the fee title to the 53 upland acres which are not at issue in this case. The Government, however, has a rather broad-gauge argument that basically rejects the idea that the plaintiff had legally exercised the option to acquire title to the 9.4 acres of lakebottom property.[11] The Government's primary argument on this issue is that FPI's proposal to defer opening the escrow account improperly attempted to extend the length of the 20-year option.[12] Since the option was improperly exercised, the

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[11] Importantly, there is no evidence to suggest that the parties to the option agreement ever believed that FPI had not properly exercised its option. Certainly, the Municipal Water District never objected to FPI's tender of the exercise of the option. Indeed, the Municipal Water District was the lead state agency on the initial EIR addressing the proposed lakebottom fill project.

[12] The Government also raises two minor arguments that can be disposed of summarily. First, the Government contends that, even if FPI had validly exercised the option, conditions subsequent to the exercising of the option and conditions precedent to the performance of the purchase of the lakebottom property existed—that is, the Municipal Water District's approval of any plans for the excavation and fill of the lakebottom property prior to purchase. The Government, however, is simply speculating when it states that FPI would not

defendant argues, the option right expired after the 20-year time period had run; therefore, the plaintiff did not own the equitable title to the 9.4 acres of lakebottom land. However, this argument is premised on an incorrect application of the law. Interpretation of land contracts and option rights are a matter of state law. As such, this Court must look to California law to determine what constitutes the proper exercise of an option right.

An option is a unilateral contract by which the optionee receives the right from the optionor to create a bilateral contract of purchase during the life of the option. *Erich v. Granoff*, 109 Cal.App.3d 920, 167 Cal.Rptr.

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have been able to secure the remaining outstanding permits and the Municipal Water District's approval in order to convert its equitable interest in the lakebottom property into a legal title to the property as the result of a completed purchase. As stated above, FPI had secured the permission of many state and local regulatory authorities. Not only was the Municipal Water District the lead state agency for the first EIR, but FPI had also obtained a shorezone alteration permit from the Municipal Water District on August 1, 1991.

Second, the Government maintains that, even if FPI had been able to purchase the property, it would not have been able to *retain* ownership because the option and the 1983 agreement had a *reversionary* clause. This reversionary clause stipulated that the lakebottom property would revert to the Municipal Water District if the plans for the excavation and fill of the property were not completed within three years of the *date of the deed*. However, this argument is unavailing because, as a result of its exercising the option, FPI held equitable title to the 9.4 acres of lakebottom property but would not obtain legal title, *and a dated deed*, until after all of the necessary permits had been obtained. Thus, the three-year period stated in the reversionary clause would not commence until FPI received legal title through a properly executed and filed deed.

538, 542 (1980). Moreover, an option must be exercised in the time and manner described by the option instrument. *See Riverside Fence Co. v. Novak*, 273 Cal.App.2d 656, 78 Cal.Rptr. 536, 539 (1969). However, if the option agreement does not specify any particular manner by which the option must be exercised, any method is permissible. *Id.* (citing *Lawrence v. Settle*, 182 Cal.App.2d 386, 6 Cal.Rptr. 49, 51 (1960)). Most importantly, unless specified in the option agreement, tender of the purchase price is not required to properly exercise one's option rights. *Erich*, 167 Cal.Rptr. at 542-43; *Riverside Fence Co.*, 78 Cal.Rptr. at 539. "Indeed, it is generally recognized that payment of the purchase price in an option contract is, unless otherwise stated in the contract, an obligation to be performed by the optionee in his performance of the conditions of the bilateral contract of purchase and sale which is formed upon the exercise of the option." *Erich*, 167 Cal.Rptr. at 542-43; *see also Murfee v. Porter*, 96 Cal.App.2d 9, 214 P.2d 543, 548-49 (1950) (noting that nothing in the option clause required payment of the price of the land to be made or tendered when the option right was exercised in order to constitute an acceptance). In order to constitute a binding contract for the sale and purchase of the property, the optionee need only give notice of acceptance of the right. *Id.*

FPI, as the optionee, attempted to exercise its option rights by notifying the Municipal Water District, in writing, that it was exercising its option to the 9.4 acres of lakebottom property located at Eagle Point. Critically, there is no provision in the option that required the *sale* to

be completed within the 20-year period. Thus, the performance of the contract was deferred by the mutual agreement of the parties. The delay in opening the escrow account was designed to be effective until the Municipal Water District cleared its title problems with the 1984 easement and Eagle Point Estates received all of its regulatory approvals. This mutually agreed deferral, while each party attended to details hindering immediate performance, constituted consideration on the part of each of the deferring parties. *See Frankel v. Board of Dental Exam'rs*, 46 Cal.App.4th 534, 54 Cal.Rptr.2d 128, 136 (1996).

As stated earlier, supra at note 6, the Municipal Water District unanimously passed an oral resolution stating that FPI had properly exercised the option. Therefore, even if the acts of Municipal Water District agents Mr. Mitchell and Mr. Lemieux, Sr., had been unauthorized in 1988, the Municipal Water District's Board of Directors found that the option was validly exercised by FPI. Subsequent ratification renders an agent's action binding on a board of directors as of the time the unauthorized act was performed. 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 87 (9th ed.1987). A municipality is subject to the same rule. 45 CAL. JUR. 3D *Municipalities* § 321 (1978); *see also Baker v. City of Palo Alto*, 190 Cal.App.2d 744, 12 Cal.Rptr. 425, 432 (1961) ("The city could, like any other party, retroactively adopt prior acts or fix retroactive dates of execution of the contract.").

Finally, nothing in the option required the Municipal Water District's *approval* of the proposed fill *before* the option could be exercised, only that it be afforded the

opportunity in the future to approve or disapprove any proposal. While the Municipal Water District retained a right to review and approve or disapprove any specific plan for excavation and filling, this right to review FPI's plan was a completely separate step that could only occur after the option was exercised. The exercise of the option was done by the November 29, 1988 letter from Mr. Foulkes to the Municipal Water District. No third party action was referenced in that exercise of the option. It was only after the exercise of the option, when the contract had already been formed, that Mr. Good's November 30, 1988 letter to Mr. Lemieux discussed how the contract was to be performed. Since third-party approval was not a condition precedent required by the option, it merely pertained to the performance of the contract, not to its formation. *See Murfee*, 214 P.2d at 548-49.

Accordingly, it is clear from the evidence that FPI properly exercised its option to purchase the lakebottom property. FPI's option contract did not specify that the tender of payment for the lakebottom property was required in order to properly exercise the option. In fact, there is no indication that the option specified any particular manner by which the optionee had to exercise its option rights. Considering this lack of particularity, and especially in light of the option agreement not requiring that the optionee tender payment as part of an effective exercise, the Court does not find that FPI improperly exercised its option rights with respect to the lakebottom land. FPI has validly exercised its option on the lakebottom land, and the property was under contract of sale to FPI.

Under California law, contract rights, including option contracts, are considered property interests. *County of San Diego v. Miller*, 13 Cal.3d 684, 119 Cal.Rptr. 491, 496, 532 P.2d 139, 144 (1975). The United States Supreme Court also has confirmed that contract rights are a form of property within the purview of the Fifth Amendment. *See, e.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n. 16, 97 S.Ct. 1505, 1516 n. 16, 52 L.Ed.2d 92 (1977) (government bonds); *Armstrong v. United States*, 364 U.S. 40, 46, 80 S.Ct. 1563, 1567-68, 4 L.Ed.2d 1554 (1960) (mechanic's lien); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02, 55 S.Ct. 854, 868-69, 79 L.Ed. 1593 (1935) (mortgage that constituted a lien under state law); *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843-44, 78 L.Ed. 1434 (1934) (insurance contract). When an option has been exercised under California law, the optionee is the equitable owner of the property and is entitled to just compensation. *County of Santa Clara v. Curtner*, 245 Cal.App.2d 730, 54 Cal.Rptr. 257, 261 (1966); *see also County of San Diego*, 119 Cal.Rptr. at 496, 532 P.2d at 144 (holding that even the owner of an *unexercised* option to purchase land, which was taken by the Government, has a compensable interest). Thus, although the Municipal Water District still owned the legal title in fee, FPI's equitable ownership in the 9.4-acre lakebottom land parcel constitutes a property interest, which is protected and compensable under the Fifth Amendment.

Also, and notwithstanding defendant's arguments to the contrary, this case does not present a "nuisance exception" problem, nor is the Government's "notice defense" argument applicable here. The concept of a nuisance

exception from the Takings Clause is a holdover from the cases that did not recognize a taking where a legitimate use of police power had occurred. *See Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (failed attempt to employ the Takings Clause to challenge the prohibition on the operation of a brewery). After the development of the concept of a regulatory taking, the Government continued to be protected from a taking claim when it had acted to prevent a use that was injurious to the community, *i.e.*, a nuisance. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), however, the Supreme Court narrowed the concept of uses that may be considered injurious to the community to a much more limited concept of uses that would be prohibited by background principles of the state's law of property and nuisance. The Government must establish that "the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.*, at 1027, 112 S.Ct. at 2899. For this defense to apply in the Government's favor, the limitation on the owner's interest "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.*, at 1029, 112 S.Ct. at 2900. Thus, when a plaintiff's use can be enjoined under background principle's of a state's law of property and nuisance, that use is not a part of the property ownership interest to begin with; hence, no taking can result because no property interest was lost. In

other words, in order to fall within the nuisance exception, the regulation at issue must do no more than allow the Government to accomplish by decree what an adjacent landowner or the state could have achieved through the state laws of nuisance or property. *Id.*

The Government argues that a court must consider federal laws which were in place prior to FPI's acquisition, in determining whether or not there was a pre-existing limitation on FPI's title. Citing to a decision by the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in *M & J Coal Co. v. United States*, 47 F.3d 1148 (Fed.Cir.1995), *cert. denied*, 516 U.S. 808, 116 S.Ct. 53, 133 L.Ed.2d 18 (1995), the Government contends that the relevant background principles that form the basis of the compensable expectancy analysis must include all of the federal laws.[13]

However, contrary to the Government's expansive interpretation of the *Lucas* nuisance exception, the Federal Circuit's plurality opinion in *Preseault v. United States*, 100 F.3d 1525, 1538 (Fed.Cir.1996) explicitly stated that "*Lucas* provides no such support" for the proposition that "background principles" can include federal law. "The background principles referred to by the Court in *Lucas* were state-defined nuisance rules." *Id.* FPI's option

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[13] Even assuming that the Government is correct, however, the fact that it took the Corps four years to deny the permit application indicates that the Corps had to go through an extensive process in order to determine that the project did not comport with the Corps' regulations. Obviously, if the defect had inhered in the title or in the project *ab initio*, the Corps presumably would have reached that conclusion much earlier.

and equitable interest in the lakebottom property were defined in reference to California law, and California law contains the appropriate background principles that form the basis of the compensable expectancy analysis. The Eagle Point Estates project neither constituted a nuisance nor was prohibited by California property law. The project's final EIR had been certified under CEQA, and there is no evidence that any portion of the project would have endangered public health and safety.[14] Therefore, the nuisance exception problem does not exist in this case.

The Government also argues that because the section 404 regulatory structure was in place prior to FPI's acquisition of the lakebottom property, the Corps' denial of the permit demonstrates that the Eagle Point Estates project was constrained by a preexisting and valid law. This amounts to the so-called "notice defense." Courts have examined the import of an existing regulatory structure at the time of purchase in terms of both the nature of the plaintiff's property interest and the plaintiff's investment-backed expectations. *Compare M & J Coal Co. v. United States*, 30 Fed.Cl. 360, 367 (1994) ("A compensable right does not exist * * * if at the time of sale an existing law or regulation precluded a certain use * * * .") with *Creppel v. United States*, 41 F.3d 627, 632 (Fed.Cir.1994) (stating that inquiring into the plaintiff's investment-

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[14] Conflicting evidence exists as to whether or not there would have been an adverse impact on the aquatic ecosystem, a positive impact on the aquatic ecosystem, or offsetting effects. However, there is simply no evidence in the record that a nuisance would have been created or that a violation of California state property law would have occurred as a result of any portion of the project.

backed expectations "limits recovery to owners who can demonstrate that they bought their property in reliance on the nonexistence of the challenged regulation."). In fact, some courts have found that an existing regulatory structure may negate the existence of a compensable property interest. This Court believes, however, that a *permit*-based regulatory system presents a situation in which it is fallacious to argue that the existence of the regulatory regime can deny a property owner the requisite compensable property interest.

The Government's contention runs counter to the nature of a permit system, "after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127, 106 S.Ct. 455, 459, 88 L.Ed.2d 419 (1985). It may be the case that in those instances where a regulation provides an outright ban on a particular use of a plaintiff's property, the owner did not have a compensable property interest. However, since in a permit-based system, up to the time of the permit denial (which would also be the time that the alleged taking occurred), it was possible that the property owner could have received the permit, it is incongruous to argue that the owner never had a compensable property interest to begin with. Rather, this Court believes that, where there is a regulatory permit procedure in effect, the plaintiff's compensable interest is best examined on the merits in terms of the owner's reasonable investment-backed expectations and not as a threshold matter in terms of whether or not the landowner owned a compensable property interest.

In summary, FPI legally exercised its option to 9.4 acres of lakebottom property adjacent to its upland property at Eagle Point. As a result, FPI was (and still is) the equitable owner of the lakebottom property with a compensable interest in this property. FPI and the Municipal Water District agreed to a variety of conditions that had to be satisfied prior to the purchase of the lakebottom property, but both parties had made substantial progress in satisfying these conditions. With regard to a pre-existing limitation on FPI's proposed use of the 9.4 acres, the proposed dredge and fill of the lakebottom property did not violate state nuisance or property law such that the use was not a part of the plaintiff's ownership interest. Finally, section 404's regulatory structure did not serve to divest the plaintiff of its compensable property interest merely because it was in place prior to FPI's acquisition of the lakebottom property.

II. Taking Analysis and the Relevant Parcel.

After concluding that FPI had an ownership/compensable property interest, the Court can now proceed to examine whether or not a constitutionally-recognized taking has occurred, *i.e.*, whether or not there was a total or near-total loss of viable economic use. Taking jurisprudence has acknowledged that a regulatory process, such as that developed under the Clean Water Act, can effect a taking. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed.Cir.1994); *Ciampitti v. United States*, 22 Cl.Ct. 310 (1991). In cases involving allegations that a taking was caused by a regulation, there are two possible types of takings. The first is termed a categorical taking, and such

a taking results "where [the] regulation denies all economically beneficial or productive use of [the] land" or is a physical occupation of the land. *Lucas*, 505 U.S. at 1015, 112 S.Ct. at 2893 (citing *Agins*, 447 U.S. at 260, 100 S.Ct. at 2141; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone*, 480 U.S. at 495, 107 S.Ct. at 1247; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-96, 101 S.Ct. 2352, 2370-71, 69 L.Ed.2d 1 (1981)). In those instances where a regulation denies an owner of *all* economically beneficial use of his land, a *per se* or categorical taking results, and the Court need not proceed with any further inquiry. A taking has occurred.

By comparison, a regulatory or partial taking pursuant to a regulation may occur when the imposition on the owner's land is "one step short of complete." *Lucas*, 505 U.S. at 1019 n. 8, 112 S.Ct. at 2895 n. 8. There is no bright-line rule, in these instances, to determine whether or not a taking has occurred. Rather, courts have engaged in essentially "ad hoc, factual inquiries" into the circumstances of each particular case. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390-91, 62 L.Ed.2d 332 (1979). To assist in this examination, the courts have advocated the application of a tripartite test to determine whether or not a compensable taking has occurred. *Lucas*, 505 U.S. at 1019-20 n. 8, 112 S.Ct. at 2895-96 n. 8 (Stating that where a property owner "might not be able to claim the benefit of our categorical formulation" and quoting from *Penn Cent. Transp. Co.*, 438 U.S. at 124, 98 S.Ct. at 2659, that the test to be applied examines " '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered

with distinct investment-backed expectations' * * * ."); *Accord Golden Pac. Bancorp v. United States,* 15 F.3d 1066, 1072 (Fed.Cir.1994) (applying three-part test to partial taking cases): *Bowles v. United States,* 31 Fed.Cl. 37, 49 (1994). In summary, the three factors of the three-tiered test to be considered are: (1) the character of the governmental action, (2) its interference with reasonable investment-backed expectations, and (3) the economic impact of the Government's action on the landowner. *Penn Cent. Transp. Co.,* 438 U.S. at 124, 98 S.Ct. at 2659; *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984); *Golden Pac. Bancorp,* 15 F.3d at 1072.

The dichotomy developed between a categorical taking and a regulatory taking compels this Court first to define the parameters of the relevant parcel. If the Court were to have decided that the pertinent property was solely the 9.4 acres of lakebottom property for which FPI sought, and was subsequently denied, a section 404 permit, then this Court would most likely have proceeded to analyze this case as a *Lucas*-type categorical taking. The justification would be that the value of the lakebottom land was essentially eviscerated due to the inability of FPI to dredge and fill the area and place residential homes on the acreage.[15] However, because the Court finds that the pertinent parcel in this case is the entire 62-acre Eagle Point Estates project (*i.e.,* the 53 acres of

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[15] An argument could be made that even if the Court would decide to consider the relevant parcel to be the 9.4 acres of lakebottom alone, that considerable value remains in the land for use by the owner even if it cannot use the property to dredge, fill and put residential houses on it.

upland property in conjunction with the 9.4 acres of lakebottom land), then the Court must approach this case using a regulatory or a partial taking analysis since there is clearly substantial value remaining in the total parcel at issue.

The United States Court of Appeals for the Federal Circuit, in determining the relevant parcel for taking cases, advocates "a flexible approach, designed to account for factual nuances." *Loveladies Harbor*, 28 F.3d at 1181. This Court in *Ciampitti*, 22 Cl.Ct. at 318, detailed an extensive list of factors which a court should consider when attempting to determine what constitutes the relevant parcel:

> Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus.

FPI, in asserting that only the 9.4-acre lakebottom property is the relevant parcel, focuses on the "separateness" of the transactions. Specifically, FPI relies on the different dates upon which the upland property was acquired and the option rights were transferred, the separate consideration that was paid for the upland property, and the option rights.[16]

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[16] The evidence presented in this case supports a finding by FPI that there was no separate consideration paid for the option, outside of the $3.6 million paid by FPI to BBP, for the 53 upland acres.

This Court must be wary of focusing solely on the particulars of a transaction. Such a myopic approach would allow sophisticated real estate investors to design a transaction so as to segregate those parts of a parcel which could run afoul of regulations, such as the Clean Water Act, and maximize the possibility of a successful taking claim. As noted in *Ciampitti*, "a taking can appear to emerge if the property is viewed too narrowly." *Id.* at 319.

Rather, in addition to the factors described in *Ciampitti*, a court should focus on how the economic expectations of the claimant, with respect to the parcel at issue, have shaped the owner's actual and projected use of the property. *Keystone*, 480 U.S. at 499, 107 S.Ct. at 1249 (property "is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations * * * ."); *Ciampitti*, 22 Cl.Ct. at 318 (stating that one factor to consider in determining the relevant parcel is "the extent to which the whole parcel could be developed."); *see also American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir.1981) (noting that how a parcel would be treated at the development stage is dispositive in defining the parcel). A property owner, who treats a series of parcels as one property for the purposes of development, financing, planning, and utilization, cannot then segregate the properties for the purpose of establishing a taking claim. Aside from the analytical flaws inherent in ignoring these considerations, the approach advocated by this Court comports with the underpinnings of taking jurisprudence. In a regulatory or a partial taking claim, the Court must examine the extent to which the value of an owner's property has been

diminished by the Government's action. However, if a property owner treats a series of properties as one income-producing unit, the value lost to the claimant is not simply the loss of the segregated parcel affected by the Government action, but the decrease in the owner's ability to utilize the unified parcels as one income-generating unit. Any other approach would elevate the style of the transaction over the substance of a property owner's treatment of a parcel.

Considering the above-described analysis, it is clear that the relevant parcel in this instance is the entire 62-acre Eagle Point Estates project (*i.e.*, the 53 acres of upland property in conjunction with the 9.4 acres of lakebottom land). This is true for several reasons. First, the upland property and the lakebottom land are contiguous parcels. In fact, the option to the lakebottom property could *only* be exercised if the optionee owned the adjacent upland property. To this Court, this is strong evidence that these two properties should be deemed one parcel for this taking analysis. In addition, while FPI makes much of the different dates upon which the upland property and the option rights were acquired, this Court believes that, to the contrary, a mere five-month separation in time is more indicative of the unity of the two parcels than the separation of the parcels. This, to the Court, evidences a clear and consistent intent by the plaintiff to treat and to develop the properties as one unit. Finally, and perhaps most importantly, from the time of the purchase of the upland property, FPI's economic intentions were to utilize the lakebottom acreage and the upland parcel in conjunction with each other as one income-producing unit. For instance, the revised

draft of the Eagle Point Estates EIR, dated March 1991, and prepared for the City of Big Bear Lake, described the importance of the lakebottom land to the marketing and to the value of the Eagle Point Estates project. The EIR indicated that Eagle Point was selected because "it would best achieve the overall project objective." The EIR explained that the following factors were used in making this judgment:

> 2. The physical characteristics of the site will allow boating access to the lake;
>
> 3. The existence of "Dredge and Fill" rights associated with the property to create access[.]

The EIR continued that the "combination of a strong demand for lake access lots, coupled with very little competition to supply such lots, provides a major marketing advantage for the applicant's property." Thus, FPI viewed the lakebottom property and the upland property as two complimentary units of one income-generating parcel, with the lakebottom property providing the owners of the lots on the upland areas with access to the lake for recreational purposes, and owners of the water front lots on the filled portions of the lake with an aesthetically unique setting.

Other documentation in the record indicates the unity, for the purposes of development and the economic expectations of FPI, of the upland and lakebottom parcels. On May 5, 1988, FPI applied to the Community Development Department of the City of Big Bear Lake for approval of the Eagle Point Estates tract. FPI included in

this application drawings of the development showing a residential subdivision with three peninsulas created by fill from the lakebottom. The application further described the project as "53.36 acres existing plus 5.4 acres lake bottom." This description of the Eagle Point Estates as one unified development utilizing both the upland and the lakebottom property pervades the numerous permit applications which FPI submitted, including the plaintiff's section 404 permit.[17] Accordingly, this Court finds that the relevant parcel for this taking analysis is the combined upland and lakebottom parcels, which constituted the Eagle Point Estates development. This conclusion is a product of the contiguity of the properties, the temporal proximity of the purchase of the upland property and the option rights, and the unity of use proposed by FPI for the upland and lakebottom properties, throughout the entire planning and development process.

Once the relevant parcel has been determined to be the entire 62 acres, it is indisputable that the parcel as a whole has substantial remaining economic viability. After the denial of its permit, FPI continued to carry on its intended business, *i.e.*, selling lots at Eagle Point Estates.[18] Indeed, most of FPI's own market projections

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[17] While all of the various permit applications include descriptions of the project encompassing the upland and lakebottom properties, there are slight variances in the number of acres which FPI planned to dredge and fill.

[18] For example, as of August 30, 1994, the plaintiff had sold a total of 25 out of its 106 lots in Eagle Point Estates for $3,547,900. All but one of the lots sold at or above the listed sales price, with the remaining lot sold to Mr. Foulkes at

demonstrated that FPI expected to a [sic] make a considerable profit on the Eagle Point Estates project even without the filled lakebottom lots.[19] Clearly, the Corps' denial of FPI's permit did not deprive FPI of *all* economic viability for the relevant parcel. On the contrary, the facts undeniably confirm that substantial and viable economic use remains in the integrated development of uplands and lakebottom at the Eagle Point Estates project. Thus, a categorical taking, or a *per se* taking, simply did not occur.[20]

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approximately cost value. As of April 30, 1996, closed sales of 28 lots generated proceeds in the amount of $4,208,000.

[19] Mr. Richard Colburn testified that the fair market value of Eagle Point Estates is approximately the share price for the lots, *i.e.*, approximately $12 million. In a letter to the Bank of America on June 9, 1992, Mr. Colburn also stated that the total developed costs of Eagle Point Estates (including land costs) would be about $7,100,000, therefore generating a profit of roughly $5 million. In a letter to Mr. Colburn, fax dated July 3, 1991, Mr. Foulkes presented a financial evaluation of the Eagle Point project in terms of its profit potential. He estimated that if the section 404 fill permit was not granted, the profit generated would range between $2 and $4 million, and that if the fill permit was granted, the profit would run between $3.6 million and $6.3 million.

[20] FPI also contends that the denial of its permit constituted a physical occupancy of the lakebottom property and, thus, a categorical taking by way of an environmental easement. FPI's logic is flawed. FPI was under a statutory prohibition against unpermitted discharges into the waters of the United States. FPI's permit for a non-water-dependent activity in a special aquatic site was denied because less damaging alternatives existed. The Federal Circuit has emphasized that Clean Water Act restrictions on the filling of wetlands cannot be equated with physical occupations, stating that a taking claim arising out of a section 404 permit denial "raises a regulatory takings claim and only a regulatory takings claim." *Loveladies*, 28 F.3d at

III. Regulatory/Partial Takings Analysis.

Having determined that the relevant parcel for analysis in this case is the entire 62-acre Eagle Point Estate project, this Court will now proceed to analyze the present case pursuant to the regulatory/partial takings paradigm. As explained, *supra*, in these instances, a court must determine when a regulation causing "a partial loss of economic use of the property has crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.' " *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed.Cir.1994). In order to determine whether or not that reduction in value rises to the level of a compensable partial taking under the Fifth Amendment, the Supreme Court has resolved the issue by using the three-tiered analysis initially espoused in *Penn Cent. Transp. Co.*, 438 U.S. at 124, 98 S.Ct. at 2659, and recently reaffirmed as the appropriate analytical framework in *Lucas*. The three-tiered analysis used in *Penn Cent. Transp. Co.*, 438 U.S. at 124, 98 S.Ct. at 2659 examines: (1) the character of the governmental action, (2) the extent to which the regulation interferes with the claimant's investment-backed expectations, and (3) the economic impact of the regulation on the landowner.

1175; *see also Yee v. City of Escondido*, 503 U.S. 519, 527, 112 S.Ct. 1522, 1528, 118 L.Ed.2d 153 (1992) ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land.") FPI's lakebottom property was wetland property prior to the application for a section 404 permit. The Corps' denial merely maintained the status quo and did not physically occupy FPI's property.

The *Lucas* court omitted discussing factor number one (the character of the governmental action) as a factor in a partial takings analysis. *Lucas*, 505 U.S. at 1019 n. 8, 112 S.Ct. at 2895 n. 8. The probable reason was that this factor generally prompts inquiries as to whether or not the Government's action is analogous to a physical invasion of its property, with compensation being more likely in such instances. *Keystone*, 480 U.S. at 488-89 n. 18, 107 S.Ct. at 1243-44 n. 18. However, the Corps' regulations, contrary to FPI's claim, do not involve the Government effecting a physical invasion of its property. Rather, the regulations at issue act to proscribe the owner's use of its property.

Furthermore, FPI did not challenge the Government's action as being arbitrary or capricious by the Corps' implementation of section 404 of the Clean Water Act. Because wetlands serve important environmental functions, *see, e.g., Riverside Bayview Homes*, 474 U.S. at 131-35, 106 S.Ct. at 461-64, there is no room for doubt that the governmental action in this case served an important purpose via the process for obtaining a section 404 permit. *See Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed.Cir.1986) (stating that "the preservation of wetlands bears a substantial relationship to the public welfare as perceived by the best lights of our time"); *Deltona Corp. v. United States*, 228 Ct.Cl. 476, 657 F.2d 1184, 1192-94 (1981). Thus, this Court will not examine any further the character of this legitimate Government action. This nation clearly has a legitimate public welfare duty to preserve the nation's wetlands, and it is a worthy national goal.

The second factor to be examined is the interference with FPI's investment-backed expectations. FPI's section 404 permit application was for the dredge and fill of approximately 9.4 acres of lakebottom property in order to augment the building of the residential development, known as Eagle Point Estates. The Corps' denial of FPI's application was based on a variety of review factors, including detrimental effects on special aquatic sites, water quality, threatened and endangered plant and animal species, shore erosion, and shore accretion. All of the major regulatory agencies, including the United States Environmental Protection Agency ("EPA"), the United States Department of the Interior's Fish and Wildlife Service, the United States Department of Agriculture's Forest Service, and the California Department of Fish and Game had recommended the denial of FPI's 404 permit application.

In the face of this regulatory consensus, FPI maintains that its investment-backed expectations are compensable with respect to the development of the Eagle Point Estate project. As support of its position, FPI notes that it spent four years developing mitigation measures with the Corps and that there never was any indication from the Corps that FPI could not overcome any obstacles to receiving a section 404 permit. In addition, FPI notes that the placement of fill in other areas of Big Bear Lake had been approved in the years preceding the FPI application for a section 404 permit.

The Court notes, however, that an investment-backed expectation "must be more than a 'unilateral expectation or an abstract need,' " it must be reasonable. *Ruckelshaus*, 467 U.S. at 1005-06, 104 S.Ct. at 2874 (quoting *Webb's*

Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 101 S.Ct. 446, 451, 66 L.Ed.2d 358 (1980)). In those instances where a regulation limits an owner's use of his land, by inquiring into the claimant's investment-backed expectations, a court "limits recovery to owners who can demonstrate that they bought their property in reliance on the nonexistence of the challenged regulation." *Creppel*, 41 F.3d at 632. *See also Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645-46, 113 S.Ct. 2264, 2291-92, 124 L.Ed.2d 539 (1993); *Ruckelshaus*, 467 U.S. at 1005-06, 104 S.Ct. at 2874-75 (no reasonable expectation that EPA would keep information confidential considering regulatory scheme). A regulatory scheme affecting the property at issue at the time of purchase can significantly discount an owner's investment-backed expectations with respect to the property. In fact, numerous courts have found that a regulatory structure can thoroughly abrogate a property owner's investment-backed expectations. *See, e.g., Golden Pac. Bancorp*, 15 F.3d at 1074 ("Given the highly regulated nature of the banking industry, * * * the Comptroller's actions could not possibly have interfered with a reasonable investment-backed expectation * * * ."); *Ciampitti*, 22 Cl.Ct. at 320-22 (no reasonable investment-backed expectations that an owner could develop wetlands in light of Clean Water Act's section 404 permit system). The rationale underlying these decisions is two-fold. First, to hold otherwise would turn the Government into an involuntary guarantor of the property owner's gamble that he could develop the land as he wished despite the existing regulatory structure. *Ciampitti*, 22 Cl.Ct. at 321. Second, it

is assumed that when a property owner purchases property that is subject to regulations which may proscribe, or limit certain uses of the property, "the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall." *Creppel*, 41 F.3d at 632. Thus, this Court must be wary of the speculator syndrome and analyze the plaintiff's expectations in light of the regulation, the agencies' actions, and the reasonableness of the plaintiff's economic expectations.

The Clean Water Act was enacted in 1972 and prohibits the discharge of pollutants into waters of the United States except in compliance with, *inter alia*, section 404 of the Act. 33 U.S.C. §§ 1251(a), 1311(a) (1994). Paragraph (a) of section 1344 authorizes the Secretary of the Army to issue permits for the "discharge of dredged or fill material into the navigable waters * * * ." 33 U.S.C. § 1344(a) (1994). In order to assist in administering the Clean Water Act, the Corps is provided with certain criteria that it must weigh in determining whether or not to issue a section 404 permit. Some of the factors include whether or not the dredge and fill will contribute significantly to the "degradation of the waters of the United States," 40 C.F.R. § 230.10(c) (1991) and whether or not there are practicable alternatives which would have less impact on the water's aquatic ecosystem, 40 C.F.R. § 230.10(a). If a project associated with a proposed discharge into a "special aquatic site"[21] is not "water dependent,"[22] "practicable alternatives that do not involve

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[21] Special aquatic sites include wetlands of the type at issue in this case.

[22] A project is not water dependent if it "does not require access or proximity to or siting within the special aquatic site in

special aquatic sites are presumed to be available, unless clearly demonstrated otherwise * * * [and] all practicable alternatives * * * which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3).

Further, the section 404 guidelines make specific reference to consideration of adverse impacts on threatened or endangered plant and animal species. Part 230.10(b) and (b)(3) of title 40 provides that "[n]o discharge of dredged or fill material shall be permitted if it: ' * * * Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended * * * .' " Subparts D and E of part 230 further discuss the potential impacts on threatened and endangered species and special aquatic sites, including the destruction of habitat, contamination and reduction of food sources, and elimination of breeding and nesting areas. *See* 40 C.F.R. §§ 230.30-.40.

This well-developed regulatory scheme was firmly in place and being enforced at the time FPI purchased the upland property and the option rights in 1988. Well prior to this time period, the public was clearly on notice that the development of wetland areas was subject to compliance with section 404 of the Clean Water Act. As a sophisticated real estate developer, FPI would be charged with knowledge of this regulatory scheme. Indeed, FPI also

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question to fulfill its basic purposes * * * ." 40 C.F.R. § 231.10(a)(3). For example, a housing project is not considered to be water dependent, while a marina is or would be considered to be water dependent to fulfill its basic purpose.

had actual knowledge that the lakebottom property was subject to the section 404 permit application process. When it purchased the option rights to the lakebottom property, FPI assumed, as the party in interest, the section 404 application already in process, which had been commenced by its sister company, BBP. Thus, FPI knew, at the time of purchase, that it would have to qualify for a section 404 permit in order to develop the lakebottom property in accordance with its plans.

Moreover, prior to the purchase of the option rights, FPI knew that unique, and possibly insurmountable, problems were implicated by its application for a section 404 permit. For instance, Mr. Tom Dodson (plaintiff's environmental consultant), in his "Biological Assessment of the Eagle Point Residential Subdivision," noted that the area contained 15 rare plant species, with two of these species being endangered, and that the area was a key perching habitat for wintering bald eagles, which were also an endangered species at the time. In a letter dated March 14, 1987, Mr. Dodson stated that FPI's application to fill the lakebottom property "is likely to require much more consultation with respective agencies than is normally the case with similar projects." On June 2, 1988, the EPA sent a letter to the Corps, with a copy to the applicant, stating that the EPA objected to the project as a nonwater-dependent project in a special aquatic site. In a July 18, 1988 letter to Mr. Dodson, the EPA reiterated the applicable permit requirements and again explained the effect of a nonwater-dependent project. Mr. Dodson's August 5, 1988 letter to the Corps reflects that he was engaged in a dialogue with the Corps concerning the water-dependency issue and regulatory restrictions. On

October 11, 1988, Mr. Dodson forwarded a practicable alternatives report to the Corps and the EPA and, in the same letter, requested that the applicant's name be changed to FPI in order to reflect FPI's purchase of BBP's option to the lakebottom property. In response to these facts, FPI decided to exercise its option to the lakebottom property in a way that would enable it to have more than three years in which to clear all of the necessary regulatory hurdles. Thus, prior to its purchase of the property at issue, FPI was aware not only that the lakebottom land was subject to the section 404 permit application process but that the application could be denied due to significant federal and state environmental concerns.

In many ways, FPI's attempt to dredge and fill the lakebottom property in order to build a residential project was a quixotic quest from the outset. Mr. John Winn, formerly Acting Regulatory Branch Chief of the Corps of Engineers, testified that, based on his experience since he began with the program at its inception in 1974, housing has never been considered a water-dependent activity. Thus, if an applicant proposes a nonwater-dependent use (*i.e.*, a housing project), it is presumed that there are less damaging alternatives. Therefore, in his view, the nonwater-dependent status of a housing project makes the likelihood of securing a section 404 permit extremely unlikely. In his entire career, Mr. Winn testified that he was not aware of any section 404 permit applications that had been issued for housing on fill in the waters of the United States that constituted aquatic sites (FPI's situation here). In addition to detailing the fragile environmental conditions at the Eagle Point Estates project and

the lack of adequate mitigation measures in FPI's proposed plans, Mr. Joseph Johns, President of Envicom Corporation, emphasized that FPI should have known that a residential development was not a water-dependent activity, especially in a special aquatic site, and permission to construct housing on the filled in wetlands would be denied as a matter of course. Ultimately, of course, the permit was denied primarily based on the water-dependency issue.

FPI's stated belief that it could overcome the regulatory hurdles involved in developing the lakebottom land is not satisfactorily reasonable for a variety of reasons not the least of which was that it was at least equally plausible that the Corps would disagree with FPI and deny its application for a section 404 permit. FPI's subjective "unilateral expectation" that it could obtain the section 404 permit through mitigation efforts simply does not give rise to a reasonable investment-backed expectation. *See Ruckelshaus*, 467 U.S. at 1006, 104 S.Ct. at 2874-75. In stating that previous fill projects had been approved before 1983, FPI fails to mention that these projects were approved by the Municipal Water District and were not approved by the Corps.[23] Thus, these prior approvals are not pertinent to a discussion of whether or not FPI could reasonably expect the Corps to approve its dredge and fill project. Moreover, even if the Corps had approved previous projects, this would not make FPI's expectation to develop the lakebottom property any more reasonable. *See Golden Pac. Bancorp*, 15 F.3d at 1075 (prior permissive

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[23] The Corps started asserting jurisdiction over wetlands on Big Bear Lake in 1985.

conduct by Government in administering regulations does not affect investment-backed expectations because Government could enforce regulations in more stringent fashion if it so chose). Finally, a growing stubbornness appears to have permeated FPI and its agent as the plaintiff was repeatedly appraised of the nonwater-dependent nature of the property and the fact that its alternatives analysis was inadequate. For example, in reaction to the EPA's letter of February 3, 1989, to FPI, which stated that the project was not water dependent and would be opposed on that basis, Mr. Dodson suggested in a letter to Mr. Foulkes, dated February 17, 1989, that FPI not address the remaining issues because they involved "other alternatives which I do not believe we should concede exist until the issue of the fill rights has been fully resolved in court."

In summary, FPI acquired the Eagle Point Estates property and exercised its option to the lakebottom property after the imposition of, and with the full knowledge of, the regulatory framework. Most importantly, FPI simply had no reasonable basis in fact or in law for expecting that it would receive a section 404 permit to fully develop the lakebottom property part of Eagle Point Estates. The plaintiff and its agent were repeatedly told by numerous agencies of the state and the Federal Government of the deficiencies in their application for a project of this type, that, according to several witnesses, had never been approved in the history of the regulation. FPI took a business risk that it would be able to obtain a section 404 permit in order to exploit its property interest in the lakebottom property and Eagle Point. Simply because FPI was thwarted from doing so by reasonable regulations

designed to protect the environment and the wetlands does not establish a sufficient reason for the Court to intervene and protect FPI against the downside of that business risk. Consequently, this Court must hold that FPI did not have a reasonable investment-backed expectation that it could dredge and fill the lakebottom land attached to the development of Eagle Point Estates at Big Bear Lake.

Having decided that the FPI did not have a reasonable investment-backed expectation of developing the lakebottom portion of the project as planned, the Court must still determine the economic impact of the regulation on the plaintiff's plans. Courts have applied relatively flexible standards to determine whether or not Government action has impacted the value of an owner's land so as to constitute a taking. Generally, courts will compare the value taken from the property in relation to that value remaining. *Loveladies Harbor, Inc. v. United States*, 15 Cl.Ct. 381, 394 (1988) (citing to *Keystone*, 480 U.S. at 497, 107 S.Ct. at 1248). Of primary importance, however, is that the owner "show a serious financial loss from the regulatory imposition." *Loveladies Harbor*, 28 F.3d at 1177.

Both parties introduced real estate appraisal evidence based on appraisals supporting their separate interpretations of the remaining economic value. FPI's real estate expert, Mr. Frank LaBella, stated that the highest and best use of the lakebottom property would be 14 lakefront lots with docks available for each of the 14 lots, as FPI proposed in its project plans. Mr. LaBella furnished a comparable cost study of the sales of 47 residential lakefront lots, and all but two were located along the south shore of

Big Bear Lake, in the same geographical area of the Eagle Point subdivision. The average value of the 14 lakefront lots in FPI's project would be $263,000 per lot. Once the costs of dredge and fill, grading, curbs, gutters, streets, utilities, engineering, environmental, permits, and other costs of development were factored into the appraisal, the net estimated value of the 14 lakefront lots would be some $2.36 million. Thus, FPI argues that it has suffered a categorical taking of its property interest in the 9.4 acres of the lakebottom land in the amount of $2.36 million.

Not surprisingly, the Government's appraisers, Mr. John C. Donahue, President of Donahue and Company, and Mr. Jeff Kauttu, a Senior Appraiser at Donahue and Company, arrived at a much different conclusion. The Government's experts calculated the fair market value of the property immediately before and after the alleged regulatory/partial taking. In the before and after scenario, they estimated the fair market value of the 9.4 acre parcel alone with no right to a permit. Alternatively, they valued the entire combined upland and submerged parcel totaling 62.3 acres in the before and after scenario assuming full development rights for a residential subdivision with respect to the 52.9-acre upland parcel but no such permit for the submerged 9.4-acre portion. In a somewhat bold and telling assumption, they concluded that obtaining such a permit was not reasonably probable. Fifteen sales were analyzed and, based upon this data, the Government's appraisers concluded that there was no change in the highest and best use using the comparable sales approach to value.

As a result of many assumptions, speculations, and inherent biases, neither of the parties' appraisers

appeared completely objective in evaluating the remaining economic value of FPI's property. However, utilizing some of their analyses and common sense, it simply cannot be said that FPI suffered the reduction in value in the parcel as a whole which is required to support a taking claim.[24] An examination of the quantum of land implicated by the denial of the section 404 permit exhibits to this Court that the Government's action in the case has merely caused a noncompensable diminution in value of FPI's land, which is not "serious" enough to cause a Fifth Amendment taking. First, the lakebottom was to occupy only approximately 9.4 acres of a residential development totaling some 62 acres. Although no houses can now be built on the lakebottom property, this property has not ceased to exist and as such it retains value to the development as a whole. As a result of the denial of the section 404 permit, FPI can still develop, and indeed has developed, the remaining 53 acres of upland property. Thus, the Corps' denial of the section 404 permit has prohibited FPI from developing only some 15 percent of the land of the parcel at issue. Also, the lakebottom parcel was only intended to contain 14 of the 123 lots planned for Eagle Point Estates—less than 11 percent of the total number of lots. Examining these facts is an acceptable means by which a court can determine the economic impact of a regulation. *See Deltona Corp.*, 657 F.2d at 1192 (denying takings claim where a plaintiff was prohibited from developing 20 percent of total acreage in entire parcel and

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[24] It should be noted that the Court took a site visit to the Big Bear Lake area during the course of the trial and thus became conversant with the Eagle Point Estates project and the surrounding comparable properties.

33 percent of developable lots). Moreover, as already indicated, the plaintiff retains considerable value in the parcel as a whole. The total current listed sales price for the lots at Eagle Point Estates is $12,048,400. Mr. Colburn has testified that the fair market value of the Eagle Point Estates is approximately the listed sales price for the lots, *i.e.*, $12 million. In a letter to the Bank of America dated June 9, 1992, Mr. Colburn also stated his opinion that the total development costs of Eagle Point Estates (including land costs) would be about $7 million, leaving a profit to be generated of about $5 million. This assessment of value is bolstered by Mr. Foulkes in his letter to Mr. Colburn on July 3, 1991, when he estimated that the profit potential, even without a section 404 fill permit being granted, would still run between $2 million and $4 million; whereas if the fill permit were granted, the profit potential would run between $3.6 million and $6.3 million. As of April 30, 1996, closed sales of 28 lots had generated gross sales proceeds in the amount of $4,208,000, with some 80 lots still remaining for sale. Upon examination of these facts, the Court holds that the Corps' action did not prevent all or substantially all of the economically viable use of the property, and, thus, the economic impact of the regulation is not sufficiently severe to constitute a taking.

IV. Final Summary.

In this action, the plaintiff contends that the Government, by denying its Clean Water Act section 404 permit application to dredge and fill approximately 9.4 acres of wetlands, took its property without just compensation, in

violation of the Fifth Amendment to the United States Constitution. Although the Court finds that FPI did have a compensable property interest in the lakebottom property by its exercising an option to purchase the wetlands, the Government's regulations did not effect a recognized, compensable taking. This is so because the relevant parcel to be considered is the combined 62-acre Eagle Point Estates. There was neither a physical taking nor invasion of this property and thus no categorical taking of this property occurred. Under the regulatory/partial taking analysis, the plaintiff is unable to demonstrate that there was any deficiency in the character of the Government's action, nor is the plaintiff able to demonstrate that it had reasonable, investment-backed expectations in the development of the lakebottom property in the manner in which it had proposed. Finally, there is substantial economic value remaining in the parcel as a whole, which supports the conclusion that the Government's denial of the plaintiff's permit only caused a noncompensable, mere diminution in the value of its property, which is not substantial enough to protect as a taking. Thus, the plaintiff's claim for just compensation, based on a regulatory/partial taking analysis, is denied.

CONCLUSION

For the foregoing reasons, the Court finds that the plaintiff has not established a Fifth Amendment taking claim against the United States. Therefore, the plaintiff's Complaint is to be dismissed, and the clerk of the Court is directed to enter judgment accordingly.

Each party is to bear its own costs.

Supreme Court, U.S.
FILED
SEP 16 1999
OFFICE OF THE CLERK

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No. 99 - 286

In the
Supreme Court of the United States

FOREST PROPERTIES, INC.
(now known as RCK Properties, Inc.),
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Federal Circuit

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BRIEF OF *AMICI CURIÆ* ATLANTIC LEGAL FOUNDATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. May government deny a Clean Water Act § 404 permit thereby taking a parcel of real property and avoiding the payment of just compensation by claiming that the parcel is not the relevant parcel but rather part of a larger parcel when in fact it was a separate parcel acquired at a different time and by a different method, is under different ownership, is located in a different political jurisdiction and is subject to an entirely different permit process?

2. May a property purchaser be denied just compensation because of notice of a preexisting governmental permit scheme, especially one that does not indicate the property owner has any reason to believe its permit application would not be granted or that, if not, just compensation would not be paid?

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Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)5, 8, 9

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John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings*, 61 U. CHI. L. REV. 1535 (1994) . 10

Robert S. Freilich and Elizabeth A. Gavrin, *Takings After* Lucas, in David L. Callies, ed. *AFTER* LUCAS: *LAND USE REGULATION AND THE TAKING OP PROPERTY WITHOUT COMPENSATION* (American Bar Ass'n Section of Urban, State and Local Government Law 1993) 11

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JOHN LOCKE, *OF CIVIL GOVERNMENT* (1690) 12

JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990) 5

Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings,* 88 COLUM. L. REV. 1667 (1988) 11

Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle,* 57 S. CAL. L. REV. 561 (1984) 9

Max Weber, *Politics as a Vocation,* in H. H. Gerth and C. Wright Mills, eds., *FROM MAX WEBER, ESSAYS IN SOCIOLOGY* 78 (Galaxy ed. 1958) 12

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BRIEF OF *AMICI CURIÆ* ATLANTIC LEGAL FOUNDATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIÆ*

Atlantic Legal Foundation ("ALF") is a not-for-profit public interest legal foundation whose mandate includes the advocacy in the courts of principles of private enterprise and the mechanism of the market economy, protection of private property rights against unnecessary governmental intrusion, limited and responsible government, opposition to unnecessary interference by government with individual rights, and vindication of constitutional rights and protections. ALF receives financial support from individuals, business enterprises, and philanthropic foundations. ALF's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, business executives, retired public

officials and judges, and prominent scientists.

In pursuit of its mandate, ALF has frequently appeared before this Court and inferior federal courts, as well as state courts in many jurisdictions, both as counsel for a party in interest, as counsel for *amici curiæ*, and itself as *amicus curiæ* in cases involving First, Fifth, and Fourteenth Amendment rights; arbitrary and capricious exercise of power by local, state and federal officials; violations of the principle of separation of powers between the legislative and executive branches of state and federal government; and appropriate standards for admissibility of expert evidence. Of particular relevance to this case, ALF (then named "Mid-Atlantic Legal Foundation") submitted an *amicus curiæ* brief in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), in support of the petitioner in that case.

The New England Legal Foundation ("NELF"), a non-profit, public interest law firm, was incorporated in 1977. Its membership consists of individuals, businesses, and others who believe in promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. *See, e.g., UNUM Life Ins. Co. v. Ward*, 119 S. Ct. 1380 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *BMW v. Gore*, 517 U.S. 559 (1996); *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58 (2d Cir. 1997); *Cigna Health Plan of Louisiana v. Louisiana*, 82 F.3d 642 (5th Cir. 1996); *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996); *Conservation Law Foundation v. Department of the Air Force*, 79 F.3d 1250 (1st Cir. 1996);

Preseault v. United States, 66 F.3d 1167 (Fed. Cir. 1995); *Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co.,* 40 F.3d 492 (1st Cir. 1994); *B.F. Goodrich Co. v. Murtha,* 958 F.2d 1192 (2d Cir. 1992); *International Paper Co. v. Town of Jay,* 665 A.2d 998 (Me. 1995); *O'Brien v. New England Telephone & Telegraph Co.,* 422 Mass. 686, 664 N.E.2d 743 (1996).

Amici seek to bring to the Court's attention their views, and those of their supporters, concerning the scope of the takings clause under the Fifth Amendment to the United States Constitution. If the decision below is not reversed, government agencies will be able to take private property with absolutely no compensation in money or development rights, simply because it is adjacent to other property under similar ownership. Moreover, under the "coming to the regulation" theory espoused by the Court of Appeals for the Federal Circuit below, property owners unable to develop their own property when a confiscatory regulation is passed will be forced to bring litigation before the area is ready for development or to sell at a steep discount. These issues are of significance to *Amici* as well as to property owners generally. *Amici* believe that this brief may provide an additional perspective which may aid the Court in determining whether to grant the petition for a writ of *certiorari.*[1]

Pursuant to Supreme Court Rule 37.2, counsel for *Amici* have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that counsel for neither Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Petitioner, Forest Properties, Inc., now known as RCK Properties, Inc.

SUMMARY OF ARGUMENT

Amici argue that the issue of partial regulatory takings needs to be addressed by this Court because of the lack of consistency among the various state and federal courts that have addressed this issue and the need to recognize partial regulatory takings as significant infringements on property rights (pp. 4–13). *Amici* further contend that a purchaser of property should not be penalized by prohibiting him or her from challenging a regulation that pre-dated the purchase, because such a theory distorts the incentives for the property's development (pp. 13–19).

ARGUMENT

I. THIS CASE INVOLVES AN IMPORTANT QUESTION OF UNSETTLED FEDERAL CONSTITUTIONAL LAW THAT SHOULD BE RESOLVED BY THIS COURT.

This Court should grant the petition for *certiorari* to clarify, and if need be rectify, an issue that has bedeviled the courts as a result of the takings jurisprudence of this Court in the last two decades. That issue arises from the disparate treatment accorded by this Court to partial physical takings and to partial regulatory takings in the context of a regulation that effectively prohibits all economically viable use of a distinct part of petitioner's property holdings.

It is clear from the Constitution itself that any interference with property rights which constitutes a taking must, under the

Fifth and/or Fourteenth Amendments, be compensated.[2] Prior to Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), however, this Court had applied the Takings Clause only to "physical invasion" of property.[3] In *Mahon*, this Court held, for the first time, that excessive regulation could constitute a "taking" requiring compensation. However, this Court has held that losses resulting from "mere" regulation are not compensable unless the regulations deprive the property owner of "all economically beneficial or productive use of land," *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987), presumably because government regulation is considered part of the cost of social order which all citizens must bear.[4] The way this Court's takings jurisprudence has developed creates anomalous results that are not, we submit, supported by reason or Constitutional principle.

Consider the following examples: There are two contiguous

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2. The Fifth Amendment states: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V.

3. A "physical invasion" need not be a transfer of ownership, or even an intrusion by the government itself. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a regulation that directly and unconditionally imposes a permanent physical occupation on an unwilling owner is a taking *per se*).

4. *See* JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 233 (1990). We submit that this formulation begs the question: Why should the landowner bear the cost of government regulation that, presumably, benefits all, or at least a broad class of persons?

properties, Whiteacre, which consists of five acres, and Blackacre, which comprises 50 acres. The two parcels are owned by different persons, who are not related to one another in any way. In the first hypothetical, the state floods all of Whiteacre and 10 of the 50 acres of Blackacre by building a dam and reservoir; there is little doubt that under takings law, the state would have to pay the owners of Whiteacre and Blackacre for five acres and 10 acres, respectively, and, assuming each acre is of equal value, the owner of Blackacre would receive twice as much compensation as the owner of Whiteacre. In the second case, the state requires the owners of Blackacre and Whiteacre to permit a utility company to lay fibre optic cable across their land, preventing them from digging foundations for buildings on all five acres of Whiteacre and ten of Blackacre's 50 acres. The owners of both properties would probably be entitled to compensation. As the Court reiterated in *Lucas*, regulations that result in permanent physical invasions require compensation, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." *Lucas, supra,* 505 U.S. at 1015; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A permanent physical invasion is called a "categorical" taking.

In a third example, the state enacts the Greenacres Protection Law, which denies the landowner of all economically beneficial use of land which is deemed "protected" under this law. One of the areas "protected" encompasses all of Whiteacre and 10 of Blackacre's 50 acres. Under current takings jurisprudence of this Court, the Greenacres statute unquestionably has effected a compensable taking of Whiteacre, because the law has deprived Whiteacre's owner of "all

economically beneficial or productive use of [its] land"[5] and therefore the state's action is "compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas supra*, 505 U.S. at 1015. Under this Court's jurisprudence, and that of the Federal Circuit, it is not at all clear whether the owner of Blackacre is entitled to compensation; under the Federal Circuit's ruling in this case it would not be, whereas under the Federal Circuit's decision in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the owner of Blackacre would be entitled to compensation for the 10 acres on which it could not build.

If Blackacre is considered as a single unit, and if we assume that each of the 50 acres is of equal value, the loss of one-fifth of the value of the property would not be considered a taking by most jurisdictions, even though it is undeniable that Blackacre's owner has fewer rights and a thing of less value after the enactment of the Greenacres law than before. If one considers only the acreage affected by the Greenacres law, distinct from the unaffected acres, takings law would compel the payment of just compensation for the five acres, since 100 percent of the five acres has been rendered economically useless.

Under current decisional law, the key issue in making the determination whether there has been a compensable taking is defining the appropriate unit of property against which to conduct the takings inquiry. In determining whether a regulation "denies all economically beneficial or productive use of land," one must make a comparison, in the form of a fraction, by dividing the value of the property after the regulatory

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5. We assume that the land has no substantial residual value for other, albeit less profitable, purposes, such as use as farmland or a nature reserve.

imposition (the numerator) by the value of the property before the regulatory imposition (the denominator). While this fractional analysis is easy to visualize, it provides little or no guidance in making the often crucial determination of what unit of property will furnish the denominator value in the deprivation fraction.[6] In the third hypothetical, if the Blackacre denominator is the value of the entire 50 acre parcel, there is no taking, yet if it is the value of the ten affected acres, there is a taking.[7]

This Court has recognized the existence and importance of

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6. Justice Brandeis, in his dissent in *Mahon*, pointed out this "denominator" problem with the diminution in value test. *Mahon, supra,* 260 U.S. at 419 (Brandeis, J., dissenting, argued that the denominator in that case should be "the value not of the coal alone, but . . . the value of the whole property," both above and below ground).

7. This is the result under the Federal Circuit's current jurisprudence. To date, the "total denial of economically beneficial use" test articulated in *Lucas* is the only partial takings test adopted by this Court. *Lucas, supra,* 505 U.S. at 1015–17. It is important to note, however, that analytically there are at least two approaches to a partial takings analysis. The first, and the one that this Court has thus far recognized, requires that all economically beneficial use of the land be denied to the owner; in other words, the property must be rendered valueless by the regulation. *Lucas, supra,* 505 U.S. at 1015. The second approach permits compensation when less than one hundred percent of the value of the land is destroyed. The Federal Circuit Court of Appeals found that a taking had occurred when the value of land was reduced by approximately sixty percent. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). Under the *Florida Rock* partial takings analysis, the appropriate parcel (the denominator) for the diminution in value fraction often will be unimportant, because a partial taking will often be found even using the whole extent of the owner's contiguous holdings as the denominator. *Florida Rock, supra,* 18 F.3d at 1572-1573.

the "denominator" issue, but has yet to provide any real guidance in this area. *See Lucas, supra,* 505 U.S. at 1016 n.7.[8] While the lower courts have been faced with several

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8. In note 7, Justice Scalia acutely observed that:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. *Compare Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922) (law restricting subsurface extraction of coal held to effect a taking), *with Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 497-502, 107 S. Ct. 1232, 1248-1251, 94 L. Ed. 2d 472 (1987) (nearly identical law held not to effect a taking); *see also id.,* at 515-520, 107 S. Ct., at 1257-1260 (Rehnquist, C.J., dissenting); Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle,* 57 S. CAL. L. REV. 561, 566-569 (1984).

Lucas, supra, 505 U.S. at 1016 n.7.

We submit that the "deprivation of all economically feasible use" rule should be abandoned as a separate category of regulatory takings, and that all takings, whether "physical invasions" or regulatory impositions, be compensated so that society will understand that there are costs to it if it expects to enjoy the benefits of superimposing the collective will on that of the property owner. Common good should be paid for out of the common purse, not out of the purses of individual property owners.

"denominator problem cases," they have been inconsistent in their *ad hoc* determinations not only on the facts, but in fundamental approach. Even within the Court of Appeals for the Federal Circuit, there is inconsistency. *Compare Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (stating that compensation was required where the denial of the fill permit destroyed all the value of one discrete portion of a large parcel—an 11.5-acre wetland that was part of a 250-acre building development) *and Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) (finding that a compensable taking had occurred where the denial of a fill permit effectively prohibited limestone mining on the land, thereby reducing the value of the land by approximately sixty percent), *with Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982) (where the court refused to engage in horizontal severance[9] and thus found no taking in the denial of two of three

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9. "Horizontal severance" refers to division of land into separate parcels or areas; it is also referred to as horizontal segmentation. The term "horizontal" is used in contrast to "vertical," "temporal," and "functional" divisions of the various interests in land. *See, e.g.*, John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings*, 61 U. CHI. L. REV. 1535 (1994). Dividing a parcel into air rights, surface rights, and subsurface rights is an example of a vertical division. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (refusing to permit vertical severance of property). Dividing property interests into life estates and future estates is an example of a temporal division, and dividing a property so as to include easements, rights of way, and servitudes is an example of a functional division. Fee, *supra*, at 1537 and n.10. This Court has recognized both the functional severance of property rights, *see Nollan, supra*, 483 U.S. 825 (1987) (holding that granting a building permit to landowners on the condition that they in return give a public access easement across their property constitutes a taking); and temporal severance of property rights, *see First English Evangelical Lutheran*

fill permit requests because other "wetland necks" were considered part of the denominator). One of the principal flaws with the "denominator" analysis is that the denominator can be manipulated by the government agency or the court to achieve a particular fraction and thus reach a "no takings" conclusion, even if the result is inconsistent with prior decisions or decisions of other tribunals, or economically unrealistic. *See, e.g., Andrus v. Allard*, 444 U.S. 51 (1979), in which the Court's assignment of "value" to the few remaining sticks in the owner's bundle of rights left the owner with purely illusory power to possess, use, or dispose of the property.[10] For a description of the subtlety of land use planners in devising methods to prevent development without incurring the obligation to pay compensation, *see* Robert S. Freilich and Elizabeth A. Gavrin, *Takings After* Lucas, in David L. Callies, ed., *AFTER* LUCAS: *LAND USE REGULATION AND THE TAKING OP PROPERTY WITHOUT COMPENSATION* (American Bar Ass'n Section of Urban, State and Local Government Law 1993).

We believe that the Federal Circuit used the correct approach in *Loveladies,* and that this Court should formally adopt that analytical model. The Federal Circuit noted that it was not deciding "whether the Government can lawfully prevent a property owner from filling or otherwise injuring or

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Church v. County of Los Angeles, 482 U.S. 304 (1987) (requiring that compensation be paid for the "temporary" taking of property that occurs between the time the regulation goes in effect and the time it is struck down by a court). The broader term "conceptual severance" has been applied to all of the different types of severance collectively. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings,* 88 COLUM. L. REV. 1667, 1676 (1988).

10. *See United States v. General Motors*, 323 U.S. 373, 377-378 (1945).

destroying vital wetlands," for the existence of substantial governmental interests in environmental conservation and preservation are undeniable, but, rather, it was deciding whether, "when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that benefit fall solely upon the affected property owner, or is it to be shared by the community at large." In resolving this question of "fundamental public policy," the court noted that it had to "balance the legitimate claims of the society to constrain individual actions that threaten the larger community with . . . the rights of the individual and our commitment to private property as a bulwark for the protection of those rights." *Loveladies*, 28 F.3d at 1174-75. The *Loveladies* court's emphasis was on the fundamental importance to liberty and democracy of the balance between individual rights, including property rights, and collective interest of society.[11]

The Federal Circuit noted that the three criteria used in making the regulatory takings determination were whether: (1) there was a denial of economically viable use of the property as a result of the regulatory imposition; (2) the property owner had distinct investment-backed expectations; and (3) in the balance

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11. Even this formulation is imperfect, because it assumes that a bureaucratic agency truly represents the interests of the community, a fact not lightly to be assumed given the complex, subtle and sometimes opaque interactions of the legislative branch, elected members of the executive branch, and the "permanent government."

    For the central importance of private property to the creation and preservation of democracy in the inevitable tension between the individual and government, *see* JOHN LOCKE, *OF CIVIL GOVERNMENT* ¶¶ 135, 138 (1690); Max Weber, *Politics as a Vocation*, in H. H. Gerth and C. Wright Mills, eds., *FROM MAX WEBER, ESSAYS IN SOCIOLOGY* 78 (Galaxy ed. 1958).

between the property owner's right to own and use the property without unwarranted governmental interference on the one hand, and on the other, the public interest asserted by the Government in support of the regulatory imposition, the liberty interest of the property owner should prevail. *Loveladies*, 28 F.3d. at 1177-78.

Historically the Takings Clause was designed to protect private citizens from governmental interference with property rights. That original purpose of the clause has, we submit, been lost or seriously diminished in the interests of expanding the regulatory state.

We urge that this Court redress the balance, and at least permit the property owner initially to shape the denominator inquiry, within the bounds of realism.

This Court should grant *certiorari* in this case and explicitly recognize the appropriateness of horizontal severance in certain cases, including this one. If, for example, the property in issue is divided under state or local law into separate lots for tax, zoning, or other purposes, it is reasonable for the court to permit the owner to treat each lot separately in the calculation of economic impact of the regulation or law that has limited the owner's rights in the property.

II. By Treating Forest Properties More Harshly than Its Related Predecessor in Title in Regard to Its Property Development Rights, The Court of Appeals Failed to Take into Account Adverse Public Policy Implications.

The Court of Appeals found that Forest Properties' investment-backed expectations were not reasonable because the Army Corps' Clean Water Act regulations were in effect when Forest Properties purchased the option to acquire the lake-

bottom property. *Forest Properties, Inc. v. United States,* 177 F.3d 1360, 1366–67 (Fed. Cir. 1999), *petition for cert. filed,* 68 U.S.L.W. 3137 (U.S. Aug. 17, 1999) (No. 99-286).

This "coming to the regulation" theory—that a purchaser on notice of a regulation cannot contest the validity of the regulation—has been disparaged by this Court in *Nollan, supra,* 483 U.S. at 833 n.2, which indicated that property owners' rights should not be altered "because they acquired the land well after the [regulatory] commission had begun to implement its policy." *Id.* In *City of Monterey v. Del Monte Dunes, Ltd.,* 119 S. Ct. 1624 (1999), this Court recently upheld a verdict in a regulatory takings case in favor of a developer who purchased the property in question towards the end of the regulatory application process without comment on the issue of "coming to the regulation."

Certainly, it is circular to insist that a purchaser loses all right to challenge a regulation simply because he or she is aware at the time of purchase that the regulation *may* be found valid. Nevertheless, as this Court has not issued a direct condemnation of the theory, several courts, as cited by Forest Properties in its Brief, Petititoner's Brief at 23, have adopted the "coming to the regulation" theory, contrary to the clear implications of this Court's holdings in *Nollan, supra,* and *Lucas, supra.*

The Massachusetts Supreme Judicial Court, on the other hand, rejected the "coming to the regulation" theory for zoning challenges in *Lopes v. City of Peabody,* 417 Mass. 299, 629 N.E.2d 1312 (1994), thus creating a conflict on an important Fifth Amendment Takings issue between the Court of Appeals for the Federal Circuit and at least one state court of last resort. *See* SUP. CT. R. 10 (a). *Lopes* was decided in light of *Lucas, supra,* on remand from this Court. *Lopes v. City of Peabody,*

507 U.S. 981 (1993); *Lopes, supra,* 417 Mass. at 300 n.2. The Massachusetts court held:

> [T]he validity of the ordinance is before us, and [the property owner], a purchaser of land subject to the restriction at the time of his purchase, has every right to challenge the continued application of the restriction. We see no reason to permit challenges to the validity of a zoning enactment only by those landowners who owned land when the zoning provision first affected it. A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.

Lopes, supra, 417 Mass. at 302–03 (citations omitted).[12]

The absurdity of denying relief to a purchaser that "comes to the regulation" is demonstrated in this case, where Forest

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12. The confusion and consequent need for clarification in this area is clear in light of the Massachusetts Supreme Judicial Court's reservation of the applicability of the "coming to the regulation" theory to takings claims. *See Lopes, supra,* 417 Mass. at 302–03 n.7; *Steinbergh v. City of Cambridge,* 413 Mass. 736, 742–43, 604 N.E.2d 1269 (1992), *cert. denied,* 508 U.S. 909 (1993). Oral argument on the temporary takings issue in the *Lopes* case is scheduled for September 13, 1999. *Lopes v. City of Peabody,* No. SJC-08030 (Mass.), 28 MASS. LAW. WKLY. 2959 (1999).

Properties purchased the option to develop the lake-bottom property from a related company, Big Bear Properties, Inc. *Forest Properties, supra,* 177 F.3d at 1362. If "coming to the regulation" were a reason to deny Forest Properties the right to develop the lake-bottom property, then the common owners of both companies could have structured the deal in such a way that Big Bear Properties retained ownership of the option through the development stage. The transfer from Big Bear Properties to Forest Properties was a convenience for the ultimate investors who preferred shifting ownership of the option and the adjacent upland from their real estate holding company to their real estate development company because they were ready to develop the land. *See id.*

A developer with a skillful attorney could eviscerate the effect of the "coming to the regulation" theory for land in corporate ownership through legal fictions including mergers, consolidations, stock transfers, formation of subsidiaries, and corporate divisions. All that would have been required in this case would have been for Big Bear Properties to have formed a new real estate holding company and transferred all its assets aside from the subdivision in question to the new company. Instead of using Forest Properties as their real estate development company, the investors would use Big Bear Properties as their development company for this one subdivision and the new company as their future holding company. The investors in a real estate company that only owned one proposed subdivision could similarly evade the "coming to the regulation" theory by transferring their stock to a new purchaser, rather than transferring the real estate. The "coming to the regulation" theory would thus invite litigation over the form of the transaction, the nature of the transfers, and the effect of partial transfers (for instance a new investor buying out the partner of a continuing investor). The theory would also

disadvantage individual property owners and developers, who would not be able to take advantage of such sophisticated transactions to protect their development rights in their property.

In addition to its potential for spawning legal fictions and litigation, the "coming to the regulation" theory loses its superficial substantive appeal when its underlying premises are examined in light of economic principles. The theory is contrary to sound public policy because it would produce unwarranted distortions in property ownership and development patterns.

For example, a property owner's claim that a regulation constitutes a taking is not ripe until the property owner is denied the right to develop. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186, 195 (1985). Thus, the owners of undeveloped property under a "coming to the regulation" regime are in a Catch-22 when a regulation restricting development is passed. The property owners cannot challenge the regulation until they are ready to develop the property and are denied a development permit, even if the regulation would clearly constitute a taking. An owner without adequate capital to develop immediately after the regulation is adopted is in a difficult position. The owner may not want or be able to face the time, expense, uncertainty, and exasperation of challenging the regulation. In such case, the value of the property to the owner is effectively reduced to zero. Nevertheless, he cannot sell at a modest discount to someone else willing to take on the challenge, because the purchaser would not retain the same right to challenge the regulation. Instead, the owner must sell to someone else at a steep discount to cover the purchaser's loss of rights under the "coming to the regulation" theory or retain the property until such time as he or she is finally able to raise the capital to develop the property

alone. This disincentive to sell at a fair price under the "coming to the regulation" theory is thus in the nature of a long-disfavored restraint on alienation of property. *See Bowen v. Campbell,* 344 Mass. 24, 26, 181 N.E.2d 342 (1962). *See also Iglehart v. Iglehart,* 204 U.S. 478, 484 (1907).

On the other hand, an owner with adequate capital at the time the regulation is passed may have an incentive to seek to develop the property immediately, so as to receive the benefits of the regulatory challenge (the recognition of his or her development rights) when he or she is capable of exercising those rights and before future uncertainties take their toll on the owner's ability to develop the property. An owner might prefer to hold property thinking that in the long run the surrounding area will grow and development of the property will be warranted. At that time, assuming the area has grown, ordinarily the owner could then develop the property or sell the property to a developer who would retain whatever development rights the original owner had. If the "coming to the regulation" theory were applied, however, the property might well be developed prematurely because it is the only way for the owner to realize the benefits of a developed property (*i.e.,* higher value per square foot), as a subsequent purchaser (without the right to challenge the regulation) would not have the same development rights as the original owner. Since the surrounding area will not by then have grown out to the development, the price for the developed property will be lower than it would be in the future and may thus not be the best investment for the owner, nor the best use of the property at the time. This incentive for premature development would thus unnecessarily contribute to the suburban "sprawl" of leapfrogged development that has been decried recently. *See, e.g.,* Gregg Easterbrook, *Suburban Myth,* NEW REPUBLIC, Mar. 15, 1999, at 18.

Under this Court's decision in *Lucas, supra,* a complete regulatory denial of any economically beneficial or productive use of property, such as the loss of the use of the lake-bottom land at issue here, should constitute a categorical taking regardless of whether the property remains in the hands of the same owner who held the property when the regulation was passed. The "coming to the regulation" theory would promote legal fictions, encourage litigation, constitute a restraint on alienation, and stimulate premature development leading to unnecessary "sprawl." The policies behind the Fifth Amendment's protection of property ownership would be vitiated if original owners are prohibited from challenging regulations until they are ready to develop while subsequent owners are prevented from challenging the regulation when the property is ready to be developed. The issue presented addresses an important aspect of property rights which this Court should resolve to bring fairness to property development decisions nationwide.

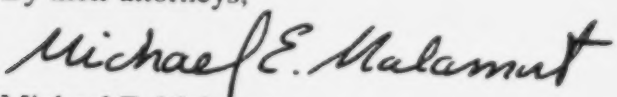
CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

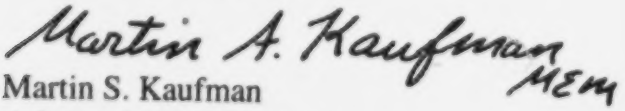
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No. 99-286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

FOREST PROPERTIES, INC.,
(now known as RCK Properties, Inc.)

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICUS CURIAE TEXAS JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

FOREST PROPERTIES, INC.,
(now known as RCK Properties, Inc.)

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

INTEREST OF AMICUS CURIAE[1]

The Texas Justice Foundation ("TJF") is a 501(C)(3) charitable non-profit organization that has as part of its mission the protection of private property rights and the free enterprise system against unconstitutional government interference. The Foundation believes in the right to own property free of excessive government regulation or confiscation and that individuals, not government, are the best protectors and

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than the Texas Justice Foundation, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

decision makers for the use of all resources, both natural, man-made and intellectual. The Foundation seeks to protect, through litigation and education, those fundamental freedoms and rights essential to the preservation of American society.

SUMMARY OF ARGUMENT

The *ad hoc* approach to determining the relevant parcel of property that is the "denominator" when deciding whether substantially all use of property has been eliminated is causing great confusion among state and federal courts. The unguided state of the law allows for arbitrary determinations of what shall be the property under consideration, and alters the outcome of cases based on the individual preferences of different courts.

This case is a useful vehicle for addressing the denominator issue because it brings together a variety of state-law elements that can be used to distinguish the two pieces of property in question and that could form the basis for a workable set of rules for distinguishing separate parcels of property under the Takings Clause.

ARGUMENT

Certiorari should be granted because the Federal Circuit's holding regarding what property forms the "denominator" in Takings analysis involves an important and recurring issue causing great confusion among federal and state courts. As this Court observed over ten years ago:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470, 497 (1987) (*quoting* Frank I. Michelman, *Property,*

Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1192 (1967)).

This Court recognized the continuing difficulty of the denominator issue in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 n. 7 (1992), but has yet to resolve the matter. As noted in the petition, the continuing uncertainty over this issue has resulted in a variety of inconsistent approaches that can often change the outcome of a case. In addition to the conflicting decisions cited by petitioners, numerous other courts have confronted the denominator issue with varying results and analyses.

In *Karam* v. *State*, 705 A.2d 1221 (N.J. Super. App. Div. 1998), *aff'd*, 723 A.2d 943 (N.J. 1999), the intermediate appellate court addressed the denominator issue in the context of two commonly owned parcels of land, a riparian parcel and the adjacent upland parcel. Despite recognizing that "the upland and riparian parcels have consistently been delineated as separate lots on the municipal tax map and in the various deeds executed over the years," 705 A.2d at 1223, the court held that the "the adjoining upland and riparian lands must be considered a single property unit" *id.* at 1228. The court acknowledged that the law was "unsettled" regarding the denominator issue, and that its decision on the issue would be dispositive as to whether all use of the property had been eliminated. *Id.* at 1227. Given the uncertainty and the lack of any guidance, the court resorted to a "flexible approach" to the "fact-sensitive question" and grouped the two parcels together in order to defeat the Taking claim. *Id.* at 1226-28 (citations and internal quotation marks omitted).

In *Zealy* v. *City of Waukesha*, 548 N.W.2d 528, 532 (Wis. 1996), the Wisconsin Supreme Court recognized the denominator problem in Takings jurisprudence and then rejected the lower court's approach "that a landowner's anticipated investment opportunities should be examined in order to determine what the parcel at issue should be." The Wisconsin Su-

preme Court then read U.S. Supreme Court precedents as never endorsing "a test that 'segments' a contiguous property to determine the relevant parcel" but rather requiring that "a landowner's property in such a case should be considered as a whole." *Id.* In discussing the denominator issue, the Wisconsin Supreme Court dismissed footnote 7 of *Lucas* as dicta and relied on the earlier cases of *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 130-31 (1978) and *Keystone Bituminous Coal*, 480 U.S. at 498, and the later case of *Concrete Pipe and Prods.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 642-44 (1993). *Zealy*, 548 N.W.2d at 532-33.

Other state court cases have similarly noted the confusion surrounding the denominator issue and simply muddled through as best they could. *See, e.g., FIC Homes of Blackstone, Inc.* v. *Conservation Comm'n of Blackstone*, 673 N.E.2d 61, 67 & n. 12 (Mass. App. 1996) (treating as a single "parcel" for the denominator 38 separate lots that were purchased in one transaction by plaintiff developer but separately sold to homeowners, and assessing "over-all estimated loss, when considering the project as a whole"), *rev. denied,* 676 N.E.2d 55 (Mass. 1997); *Adams Outdoor Advertising* v. *City of East Lansing*, 591 N.W.2d 404, 411-12 (Mich. App. 1998) (rejecting City's bold claim that denominator should be plaintiff's aggregate property in the "entire Lansing metro market" but seeming to favor in dicta a common ownership/contiguity rule); *East Cape May Associates* v. *State*, 693 A.2d 114, 119, 128 (N.J. Super. App. Div. 1997) (recognizing the "presently unsettled state of New Jersey and Federal law" regarding the denominator issue and remanding for further factual development regarding the State's claim that the denominator should include a separate tract of land across a county road allegedly having common beneficial ownership).

Further guidance on this issue is necessary because the current *ad hoc* approach invites the arbitrary imposition of an individual court's preference as to who should pay for a given piece of social policy rather than requiring a reasonably pre-

dictable application of law. Property law in general, and Takings law in particular, is fundamentally concerned with protection of established economic rights. Allowing various courts to avoid predictable state-law distinctions between separate pieces of property undermines both property and constitutional law. Such an approach forces owners to guess whether a given piece of property will be aggregated with others and thus subject to uncompensated taking, or whether it will be accepted as distinct and thus protected from government confiscation. What is needed is a clearer line as to when property will be treated separately or in the aggregate so that business may structure their affairs accordingly and have reasonable confidence as to how their property will be treated when the government chooses to eliminate the utility of a given parcel without formal condemnation.

Finally, this case is a useful vehicle through which the Court can address the denominator issue. There are multiple state-law bases for distinguishing the riparian and the upland properties in this case. The Court thus can choose among distinctions based on the nature of the two properties (option right versus a fee simple interest), the different jurisdictions in which each property is situated, different times of purchase of the properties, different owners of the fee in the two parcels, and different development rules governing the different parcels. Any one or several of these state-law distinctions between the properties could serve as the basis for a new and clear rule regarding when separate properties should or should not be aggregated for purposes of forming the denominator in the Takings equation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 99-286

In the
Supreme Court of the United States

FOREST PROPERTIES, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. May government deny a Clean Water Act § 404 permit thereby taking a parcel of real property and avoiding the payment of just compensation by claiming that the parcel is not the relevant parcel but rather part of a larger parcel when in fact it was a separate parcel acquired at a different time and by a different method, is under different ownership, is located in a different political jurisdiction, and is subject to an entirely different permit process?

2. May a property purchaser be denied just compensation because of notice of a preexisting governmental permit scheme, especially one that does not indicate the property owner has any reason to believe its permit application would not be granted or that, if not, just compensation would not be paid?

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John F. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994) 14-16

INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by the government regulation of private property.

Attorneys for Pacific Legal Foundation have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and have participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. Pacific Legal Foundation attorneys are also currently representing Mr. Bailey Jones in a petition for certiorari before this Court in *Jones v. City of Berkeley*, Supreme Court Docket No. 98-1774, another case in which an appellate court denied a property owner relief for a regulatory taking. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

Pursuant to Supreme Court Rule 37, written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Forest Products, Inc. (FPI), acquired an equitable interest in 9.4 acres of property that were suitable for single-family home development. (This equitable interest is a protected property

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

right according to California law.) The land was similar in many respects to property that had already been developed in the area.

The property is in an environmentally significant area. Petitioner's Appendix (App.) at B10. FPI worked hard to make the area--along with an adjacent 54-acre upland parcel--suitable for development. In its final plan, FPI agreed to 25 mitigation measures including avoidance of the rare plants, a scaled-back development proposal, the setting aside of 16 acres of the uplands as "open space" and wetlands mitigation. App. at B10-11.

Although it received the necessary state and local permits, FPI had to obtain a permit from the United States Army Corps of Engineers. The Corps asserted jurisdiction over the wetlands and found that FPI's final proposal would involve the fill of "7 acres of vegetated shallows" and 1.6 acres of wetlands. App. at B16. Because single-family homes are not "water-dependent," and because the Corps found that the property could be put to some unspecified "alternative uses," it denied a permit that was necessary to build the homes. App. at B15-17. In other words, building single-family homes in a wetland is out of the question.

FPI was able to develop the upland property that it owned in fee but not the 9.4-acre parcel. Trial testimony indicated that FPI was unable to make economically viable use of the 9.4 acres, it lost several million dollars, and that its equitable title is worthless. App. at A5-6, B20. FPI sued for a taking. *Id.* at B20.

The trial court found if it had focused on the 9.4-acre parcel in which FPI had only an equitable interest, it "would most likely have proceeded to analyze this case as a *Lucas*-type categorical taking." App. at B35. Instead, it forewent the categorical approach and measured the loss of economically viable use by looking at FPI's total landholdings in the area--the 9.4-acre parcel ***combined*** with the 54-acre parcel. Because FPI was able to make use of the 54-acre parcel, FPI was also able to make enough use of the total 63 acres of land (the 9.4 acres owned as an equitable interest and the 54 acres owned in fee) to obviate a finding of a regulatory taking, categorical or otherwise. App. at B54-55. The

court also found that, at the time FPI purchased its option to buy in 1988,

> the public was clearly on notice that the development of wetland areas was subject to compliance with section 404 of the Clean Water Act. . . . Indeed FPI also had actual knowledge that the lakebottom property was subject to the section 404 permit application.

Id. at B47-48. Therefore FPI did not have any "reasonable investment-backed expectation" to develop the property. *See id.* at B50.

The Court of Appeals affirmed. It found that the trial court did not commit "clear error" when it directed its takings analysis at the total 63 acres of land rather than the 9.4-acre parcel for which the permit had been denied. The court also found that FPI should be denied recovery because "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss." App. at A12 (citing *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1995)).

REASONS FOR GRANTING THE WRIT

SUMMARY AND INTRODUCTION

Twelve years ago, this Court laid down the law in *Nollan v. California Coastal Commission*, 483 U.S. 825, and *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), and explained that there was such a thing as a regulatory taking and that money damages would have to be paid in the event that a government agency takes property through regulation. But this Court has left it to the lower courts to define when a taking has actually occurred. The lower courts have failed to reach any consensus. Some landowners get fairly compensated; most do not. Some courts have enunciated clear standards; most have not. This case presents an opportunity for this Court to clarify two of the more bedeviling questions in takings jurisprudence. First, what happens when a landowner

faces something less than a total wipeout of his property holdings? And second, what difference does it make to a government's ability to obtain property without paying just compensation if the landowner knew of a regulatory regime before acquiring the property? This amicus brief will explain that this Court should grant FPI's Petition for Writ of Certiorari (Petition) in order to put an end to the confusion among the lower courts and to ensure that the Constitution's promise that property shall not be taken for public use without the payment of just compensation becomes something more than a hollow promise.

I

WHEN GOVERNMENT TAKES PRIVATE PROPERTY FOR A PUBLIC USE, IT OUGHT TO PAY JUST COMPENSATION, EVEN IF THE OWNER OWNS OR OWNED OTHER PROPERTY

A. A Taking of All Use of a Portion of an Owner's Property Warrants as Much Protection as a Physical Invasion

A taking can occur when a regulation deprives an owner of the "economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). In analyzing what has become known as the "relevant parcel" or the "denominator problem," this Court recognizes that, if a trial court were to examine in a takings analysis ***only*** the discrete segment of property that is affected by a use prohibition, then it is more likely that the court will find a taking. Concomitantly a deprivation of "economically viable use" is less likely to be found if a court were to examine the larger land holdings of a landowner because, so long as the owner can use ***some*** property, the owner has not been deprived of economically viable use of ***all*** of his property. Thus government regulators encourage courts to consider as the "relevant parcel" the entirety of the affected parcel. Some government advocates even suggest that courts should also consider other lots owned by the landowner now or in the past that are adjacent to or in the vicinity of the segment of land actually impacted by the use prohibition.

This Court put the issue this way in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987):

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Id. at 497 (citation omitted).

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), this Court found that, when a regulation prohibiting the construction of a single-family home in a residential neighborhood denied "all economically beneficial or productive use of land," it was a "categorical" taking. In this Court's terminology, a "categorical" taking is one where the denial of all economically viable use is a given and where no countervailing concerns--such as the owner's reasonable expectations or the public interest advanced by the use prohibition--can negate the need to pay just compensation for the taking. But this Court expressly left open the question of whether a denial of all use of a part of a parcel might constitute a regulatory taking. 505 U.S. at 1016 n.7.

Quite naturally, government agencies argue that, the larger the ratio between the total parcel and the area affected by the use prohibition, the less likely it will be that there has been a "categorical" taking of all use. But why should this be? For the only other type of "categorical" takings--physical invasions--this Court has made it plain that ***any*** physical invasion of ***any*** size is a taking that can lead to the compensation requirement.

It is well known that, if government authorizes a "physical invasion" of private property, it is a taking, no matter how small a portion of the property may be affected. In both *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-40

(1982), this Court found that a physical invasion was a per se taking, even though the interest in land affected by the invasion was small (*Kaiser Aetna*) to minuscule (*Loretto*). *Accord Lucas*, 505 U.S. at 1014. And it is black letter law that, if the government takes even a tiny portion of one's property for a public works project, the government must pay just compensation. So why should it be any different if the government destroys the use and value of a portion of property through regulation rather than invasion? Indeed, the distinction between physical invasion, formal condemnation, and regulatory takings was questioned by Justice Brennan in 1981. Dissenting over this Court's refusal to reach the merits in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan wrote:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property.

Id. at 652 (footnote omitted) (Brennan, J., dissenting). In other words, if compensation must be paid when government action results in a physical invasion of property, or if it builds on a discrete segment of property, then why not if through regulation the government converts a segment of private land into a de facto and de jure refuge for wildlife, wetlands, or open space?

Government agencies counter, however, by arguing with some justification that, if ***every*** prohibition on using a portion of a parcel of property were to constitute a taking, then government's ability to control inappropriate land uses would be made more difficult. This tension between the interests of the affected property owners and the need for efficient operation of government has pervaded the case law on regulatory takings. For the simple question of what is the relevant parcel when government prohibits the use of only a discrete segment of land, the lower courts are hopelessly split. The split is even more

pronounced when the question becomes more complicated, as when multiple lots are involved or when some lots have already been sold off. Fortunately, there is a coherent and logical solution to this dilemma that has been suggested by one commentator and which has been adopted by one lower court. With this case, this Court can put an end to the unsatisfying state of conflict in the lower courts and adopt a meaningful standard. This brief will next describe the state of the conflict in the relevant parcel doctrine and then suggest a workable solution.

B. The Lower Courts Do Not Agree on Whether the Denial of All Use of a Portion of a Single Parcel Is a Compensable Taking

In *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (*Florida Rock I*), the Federal Circuit Court of Appeals was confronted by a single 1,560-acre parcel subject to the Corps of Engineers' restrictions. The landowner argued that all 1,560 acres of its wetland mining property had been taken after a permit to mine 98 acres was denied. 791 F.2d at 895-96, 904-05. The government argued that there was ***no*** taking because the use of only 98 acres had been denied--leaving the "parcel as a whole" largely unaffected by the denial. *Id.* at 904. The Federal Circuit rejected both arguments, holding that (1) it would be unfair to award compensation for the 1,458 acres for which the applicant had no immediate plans, *id.* at 904-05, and (2) the court would focus on the 98 acres to see if there had been a taking. *Id.* at 904.

Several years after *Florida Rock I*, the Federal Circuit responded to the government's new argument that the takings denominator should include more than the mineral rights and surface resources needed for mining. The court disagreed:

> By taking some portion of Florida Rock's economic use of the property--its power to disturb the overlying wetlands, and with it the common law property right to mine its subsurface minerals--the Government

> appears to have destroyed part of the value of Florida Rock's holdings.

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1572 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995) (*Florida Rock IV*). The court said this could be a taking. *Id.* It also noted that in appropriate circumstances a subset of the bundle of rights can be taken through inverse condemnation. *See id.* at 1572 n.32. *See also Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991) (the court rejected the government's suggestion that there was no taking because the coal owner could farm about half of its property.)

The Tenth Circuit in *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995), however, expressly rejected the *Florida Rock IV* holding. *Clajon* involved an attempt to bring a takings challenge to hunting regulations in Wyoming that limited wild game licenses sold to hunters from out-of-state. The plaintiff, who owned a ranch and derived income from out-of-state hunters, complained that this was a taking of a property right in hunting. 70 F.3d at 1577. In ruling against the landowner, the Tenth Circuit expressly rejected the Federal Circuit's language in *Florida Rock IV* that it can be appropriate to focus more narrowly on the property interest actually taken:

> However, we believe that the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land. . . . Thus, we reject the *Florida Rock* approach.

Id. (citations omitted).

More recently, in *Boise Cascade Corporation v. Board of Forestry*, 935 P.2d 411 (Ore. 1997), a landowner was prohibited from logging 56 acres on a 64-acre tract because of a spotted owl nest. The Oregon Supreme Court held that the landowner could state a claim for a regulatory taking. *Id.* at 415-16. Thus the court segregated the 56 acres of owl habitat from the remaining

8 acres of harvestable timber and considered the timber on the 56 acres to be the relevant parcel.

The lesson from these cases is that some courts have been quite willing to focus on what has actually been taken out of a single parcel. But in the case of *Forest Properties*, the Federal Circuit is in conflict with itself and the Supreme Court of Oregon. And while the Tenth Circuit is in conflict with *Florida Rock*, there is no apparent conflict with *Forest Properties*.

C. A Few Courts Have Divided a Single Parcel for the Purpose of a Takings Analysis

In *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981), the county placed two contiguous sections of an owner's property into two distinct zoning classifications. First, there was a 48-acre section called Strawberry Spit zoned as "urban open space" with a 5-acre minimum lot size. Another 20-acre section known as "Strawberry Point" was zoned to allow four "multiple residential units" per acre. *Id.* at 367. The owner alleged a taking of Strawberry Point. In response, the county advocated a "single parcel" theory under which both the point and the spit would be considered together in a takings analysis.

The court rejected as inapplicable cases where property was treated as a single unit for takings purposes because in those cases "the entire subject property was covered by a uniform restriction." *Id.* Instead, the court noted that in *Nectow v. Cambridge*, 277 U.S. 183 (1928), this Court "considered the smaller tract separately from the larger tract." *American Savings*, 653 F.2d at 370.

The Ninth Circuit also agreed with dicta in *Fifth Avenue Corp. v. Washington County*, 581 P.2d 50, 60 (Ore. 1978), where "the [Oregon Supreme] court divided the property analytically into two parcels" depending on whether they were zoned as developable or not. *American Savings*, 563 F.2d at 370.

Most significantly, the *American Savings* court concluded by holding that if the appellant can show that

> the Spit and Point have been, or would be, treated separately when its development plans are submitted . . . [then] the Spit must be analyzed as a separate parcel for takings purposes.

Id. at 372.[2]

But in *Forest Properties*, although the Corps regulated ***only*** the 9.4 acres of the lake bottom parcel, the court did ***not*** consider it to be a "separate parcel for takings purposes."

D. Courts Are Divided on How to Treat a Landowner Who Has Already Developed Other Land Near the Land That Is Affected by a Prohibition

In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the landowner started off in the 1950's with 250 acres. After some 199 acres had been subdivided and sold off, the owner sought to develop the remaining 51. New Jersey required the owner dedicate 38.5 acres as a wetland preserve in order to get a state permit. When the Corps denied a permit on the remaining 12.5 acres, the owner sued for a taking.

The government argued that the relevant parcel must be the original 250 acres or, in the alternative, the 51 acres. The Federal Circuit had no trouble holding that the 199 acres that were developed and sold before the imposition of the current regulatory environment should not be considered in the denominator.

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[2] *Accord Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990). ("Most importantly, the City has treated Queen's Beach separately for zoning and planning purposes. . . . [U]nder the facts of this case, Queen's Beach is to be considered a separate parcel for the purposes of determining whether there has been a taking. 649 F. Supp. at 947-48.).

Id. at 1181. As for the 38.5-acre parcel, the court suggested it would be "ungrateful in the extreme" to count the 38.5 acres in the denominator. *Id.*

Similarly, in *Twain Harte Associates, Ltd. v. County of Tuolumne*, 217 Cal. App. 3d 71 (1990), the county had applied different zoning criteria to different portions of an 8.5-acre parcel. After most of the 8.5-acre parcel had been developed, the county rezoned an undeveloped 1.7-acre plot to open space. In response to a taking allegation, the county argued that there was no economic deprivation and no taking because the "8.5-acre parcel has . . . undoubted monetary benefit" from the past development. *Id.* at 85. The court first noted that "the nature of a particular land use regulation has been recognized as potentially creating separate parcels for 'taking' purposes." *Id.* (citing *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 495-96 (1982); *Nectow*; and *Fifth Avenue).* The court concluded:

> the law does not demand the entire 8.5 acre parcel be treated as a whole in an "as applied" inverse condemnation analysis.

Id. at 87.

In contrast to *Twain Harte* and its own decision in *Loveladies*, the Federal Circuit decided in *Forest Properties* to lump 9.4 acres of lake bottom property with an adjoining 53-acre segment of uplands. The court concluded that it was proper to look "to the economic reality of the arrangements, which transcended these legalistic bright lines." App. at A10-11. But the economic reality in *Loveladies* was that the owner was able to develop nearly 200 acres and still receive compensation for the taking of 12.5 acres. The economic reality in *Twain Hart* was that the owner was able to develop 6.8 acres and still receive consideration for the remaining 1.7 acres. The "economic reality" is no different here--except that in contrast to *Twain Hart* and *Loveladies*, the Federal Circuit has included other holdings in the takings denominator.

E. The Federal Circuit Is One of Several That Is in Conflict with the Logic of This Court in *Lucas*

In *Lucas*, this Court expressly rejected as "extreme" and "unsupportable" the notion advocated by the New York Court of Appeal in *Penn Central Transportation Company v. New York City*, 42 N.Y.2d 324, 333-34, 366 N.E.2d 1271, 1276-77 (1977),

> where the state court examined the diminution in a particular parcel's value . . . in light of total value of the takings claimant's other holdings in the vicinity.

Lucas, 505 U.S. at 1016 n.7. Despite the logical incongruity of the idea that owners of lots of property should be treated worse than owners of only a small amount of property, the idea that the ownership of other clearly separate parcels diminishes the impact on a regulated parcel has been adopted by the Federal Circuit in *Forest Properties*.

The Federal Circuit is not the only court to make this error. The Michigan Supreme Court in *K & K Construction Co. v. Department of Natural Resources*, 575 N.W.2d 531 (Mich.), *cert. denied*, 119 S. Ct. 60 (1998), the court combined a 55-acre parcel with two other parcels of 16 and 3.4 acres for purposes of determining whether there was a taking. The court reasoned that the parcels were owned in whole or in part by the same owner of the 55-acre parcel and that there was a unified plan of development. The same reasoning was followed in *Volkema v. Department of Natural Resources*, 542 N.W.2d 282 (Mich. App. 1996), *aff'd*, 42 N.W.2d 282, *cert. denied*, 119 S. Ct. 590 (1998).

The Michigan example was also followed in *Karam v. State of New Jersey Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998), *affirmed by adopting appellate opinion*, 723 A.2d 943 (N.J. 1999), *petition for cert. filed*, 67 U.S.L.W. 3774 (May 20, 1999) (Case No. 98-1866). In *Karam*, the appellate court examined the history of a lot comprised of an upland and wetland unit and found the two portions to be a single unit for a takings analysis.

These cases all follow the logic of the notion that this court rejected in *Lucas*: the more real property one owns, the more the government can take without having to pay for it. Would this Court have countenanced the uncompensated taking of one of David Lucas' lots if he had been allowed to build on his second lot?

F. The Federal Circuit's Holding in *Forest Properties* Is Inconsistent With Those Courts That Have Adopted the Doctrine of Conceptual Severance

In *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (N.Y. 1989), the New York Court of Appeals addressed a challenge to New York City's law regulating the conversion of single-room occupancy housing. The city had suggested that the property owners could have no claim to a taking or denial of economically viable use after comparing the value of the rights affected by the law with the total "bundle" of the owners' property interests. 542 N.E.2d at 1067. The court did not agree:

> But the permanent abrogation of one of those rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking.

Id. The court elaborated by citing with favor

> various comments on the theory of "conceptual severance" [i.e., assessing only the value of the rights taken without regard to its relationship to the value of the whole property].

Id. Accord Manocherian v. Lenox Hill Hospital, 84 N.Y.2d 385, 398-400, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 115 S. Ct. 1961 (1995) (finding the destruction of a reversionary interest to constitute a regulatory taking).

This Court has also on occasion found a taking when only one strand in the bundle of property rights was affected. In both

Hodel v. Irving, 481 U.S. 704 (1987), and *Babbitt v. Youpee*, 519 U.S. 234 (1997), the Court struck down congressional attempts to force the transfer of small fractional interests to the tribes upon an owner's death.

In the case of *Forest Properties*, the court below declined to consider separately (or sever horizontally) the 9.4 acres of wetlands from the separately owned and regulated 54-acre upland parcel. In this case, the "horizontal" severance is much more severe than the conceptual severance that some courts have embraced. The difference in results is illogical.

G. Toward a Coherent Determination of the Relevant Parcel--the *Machipongo* Example

Much more faithful to the Takings Clause of the Constitution is a model for analyzing the takings denominator that was proposed by a commentator and which has been expressly followed by at least one court. A better way to analyze the takings denominator is to conclude that

> any identifiable segment of land is a parcel for purposes of regulatory taking analysis if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding land segments.

John F. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1557 (1994).

The key language here is "independent of the surrounding land segments." With this qualifier, the specter of governments being forced to pay for setbacks and similar regulatory restrictions is substantially lessened. Under this standard,

> it must be shown that there existed prior to regulation at least one economically viable use for the land, the value of which is derived independently of the immediately surrounding land interests.

Id. at 1558. As Fee explains:

> In many situations, an identifiable segment of land may be put to no economically viable use, other than to expand or beautify a building or business operation existing on a neighboring segment of land.

Id. at 1559. A restriction on the use of such a segment of land, such as with a typical setback, would not be typically compensable under this "independent of the surrounding land segments" qualifier. The only exception would be if this segment were significant enough that by itself it could be economically useful for a purpose unrelated to the use of the neighboring segment. "Under no circumstances," Fee concludes,

> should an owner of a city lot be compensated for what is in fact a diminution in value of the entire lot by alleging that the buffer zone has been completely taken.

Id. at 1559-60.

The test proposed by Fee was adopted by a Pennsylvania appellate court in *Machipongo Land and Coal Co. v. Commonwealth of Pennsylvania*, 719 A.2d 19 (Penn. 1998). In *Machipongo*, the owners of a coal deposit alleged that the designation as "unsuitable for mining" (UFM) of 157 acres, out of a total of 2,037 acres, constituted a taking of at least 1,344,800 tons of coal. Another coal owner alleged that 27 acres of 1,350 acres had been taken by the UFM designation.

The court first rejected the commonwealth's theory that the appropriate bright-line test should be to consider together all "contiguous land under a common owner." The court rejected the test for two reasons: first it was facially unfair to treat owners of larger parcels less favorably for the sole reason that such owners have more property. Second, the court noted that owners who had "sold off" portions of their property would be arbitrarily better off than those owners who had not yet sold off their land.

The court also rejected the approach suggested by the landowners: "defining the property interest by the regulation."

Under that test, virtually any segment of land affected by a prohibitory regulation, such as a setback ordinance, would result in a verdict of a taking. This, the court felt, would not reach a proper balance of the public's interest with the interests of the private property owner.

A third approach rejected by the court was what it called a "multi-faceted approach." This test considers "investment-backed expectations," whether any land had already been sold off or developed, "the dates of acquisition," "the extent to which the test has been treated as a single unit," and "the extent to which the protected land enhances the value of the remaining land." The problem with this approach, the court wrote, is that it "fails to offer either regulators or property owners any certainty as to whether a regulation will result in a taking." 719 A.2d at 27-28.

Instead, the court adopted the "defining the property interest by regulation" test as modified by Fee's suggestion that only segments that are economically viable independent of surrounding segments be considered. It employed the Fee analysis by asking the following questions:

- whether the regulated land had value prior to the regulation;
- whether the regulated land has a separate use from the non-regulated contiguous parcel(s)–i.e., whether it may be profitably used if it is the only parcel; and
- if the regulated land has value separate from the contiguous land, whether all of its economic benefit is gone.

Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. at 28.

If this Court were to grant FPI's Petition, it could put an end to the rampant conflicts in the lower courts by adopting the

workable and fair test that has been utilized by the Pennsylvania court.

II

"NOTICE" OF A REGULATION DOES NOT OBVIATE A TAKING

A. The Government Should Not Be Rewarded With a Windfall Just Because the Owner of Property at the Time a Regulation Is Adopted Is Not the One to Bring an As-Applied Takings Claim

In its decision below, the Federal Circuit held that "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss." App. at A13 (quoting *Creppel v. United States*, 41 F.3d at 632).[3] That certainly is the ***result*** of the court's decision but, when it comes to bringing an as-applied challenge to a regulatory program, the real question is ***why*** should ***any*** landowner bear this "risk of economic loss." It is, after all, the government that has created the restraint, not the landowner at the time the regulation was adopted and not the purchaser of the property who brings an as-applied challenge. The end result of the Federal Circuit's rule is that the government is getting something for nothing.[4]

Suppose that a government regulation establishes a permit process for the use of real property--the use of which would not

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[3] A similar result was reached by the Federal Circuit in *Good v. United States*, 1999 WL 673336 (Fed. Cir. Aug. 31, 1999) (Case No. 97-5138), finding that owner has no reasonable investment-backed expectations to develop heavily regulated property which he bought in 1973 because the owner was "not oblivious" to the trend of ever-increasing environmental regulation that resulted in statutes being adopted after the purchase.

[4] If it were not for the court's error regarding the relevant parcel, this would have been a categorical taking. App. at B35. The relevancy of expectations in the context of a categorical taking is questionable after this Court's decision in *Lucas*. *See Lucas*, 505 U.S. at 1015.

be considered a nuisance or otherwise barred by background principles of a law. The regulation falls short, on its face, of denying all use and value of a parcel of real property. Is that a taking? Of course not. This Court has found that the mere passage of a discretionary permitting requirement does not, without more, constitute a taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) ("the mere assertion of regulatory jurisdiction . . . does not constitute a regulatory taking").[5]

In many instances the owner at the time the regulation is adopted may be able to file one or more applications to use the property--only to have each application unequivocally denied. But in other instances an owner may ***not*** be able to ripen a claim through the application process. This is especially true for the owner of a smaller lot, or an owner who is too old or too poor. It may be that such an owner's only recourse is to sell the property.

Suppose further, that the actual application--through the permit process--of this regulation prohibits all use of the property such that there is no value remaining. Who should bear the cost of the prohibition--the owner at the time the regulation is adopted, the subsequent owner who applied for a permit one or more times, or the government that denied the permit?

It is true that the subsequent purchaser may have acquired the regulated property at a discount. But so what? The new owner is assuming certain expenses, risks, and transaction costs in pursuing the permit process and takings claim. The question here is not whether any just compensation damages are fairly allocated between the original owner and the subsequent purchaser, but

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[5] This Court has also made it quite plain that courts should not hear an as-applied takings claim unless and until the owner has availed himself of the appropriate permitting procedures. Until that happens, the claim is simply not ripe. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94 (1985) (describing need to obtain "final decision" from administrative agency).

whether the government will have to pay any damages at all to anyone at all. Under the Federal Circuit's rule, the answer is no. Because the owner at the time the regulatory scheme was adopted was not the same person who made the permit applications, the government gets the benefits of a regulatory taking with none of the costs.[6]

B. The Federal Circuit Contradicts This Court's Holding in *Lucas*

In a recently published article, Professor Steven J. Eagle is highly critical of the notion that just compensation is not available when the application of a regulation takes private property just because the owner purchased the land subject to an existing regulatory scheme. *See* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. Sch. L. Rev. 345, 376 (1998). One of Professor Eagle's principal criticisms is that this doctrine artfully rewrites this Court's holding in *Lucas*.

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[6] As with so many other areas of takings law, the courts below are in substantial conflict on how to resolve the issue of who should pay when a subsequent owner of real property brings an as-applied takings challenge. *See, e.g., Karam v. State of New Jersey*, *supra* ("the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge"); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994) (an "as applied" but not a "facial" takings challenge can be brought by a purchaser of regulated property); *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229, *rev. denied*, 613 So. 2d 3 (Fla. 1992) ("no taking occurred until DER denied Vatalaro's permit application and determined the property was suitable only for limited passive recreational use"); *see also Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *affirmed*, __ S. Ct. __ (1999) (takings claims proceeds despite the fact that land was purchased with knowledge of permitting requirements). FPI's Petition cites to several cases that are contrary to these. See Petition at 24-24.

Focusing on several holdings from New York that reach the same conclusion as the Federal Circuit, Eagle suggests that the idea that the right to bring an inverse condemnation claim against the application of a regulation must be transferable with the property. Otherwise, the court

> converts an important component of the fee simple--the right to use one's land--into a personal right that has to be exercised during life or else vanishes.

Id. at 368. The impact of such a rule is especially apparent when the prior owner was a decedent who "'through infirmity or other reason, could not challenge a confiscatory regulation prior to the decedent's death.'" *Id.* This conversion of the fee simple into something else contradicts this Court's admonition in *Lucas* that

> the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.

505 U.S. at 1014.

CONCLUSION

To resolve the conflicts among the lower courts, and to ensure that property owners are not deprived of just compensation when they suffer regulatory takings, this Court should grant FPI's Petition for Writ of Certiorari.

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Respectfully submitted,

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